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IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1996, Congress granted cable and telecommunications companies a mandatory right of access to a utility's privately owned poles, ducts, conduits and rights-of-way for installation of wires, cables and associated equipment. This statutorily authorized taking entitles a utility to just compensation. Thus, the first question presented for review is:

1. Whether the court of appeals' holdings that:

   a. tangible private property can be categorized as "nonrivalrous" and thus deemed to have zero value; and

   b. mere reimbursement of the cost of preparing private property to be taken ("marginal costs") is sufficient compensation;

violate the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

It is an ancient rule of this Court that Congress cannot both decide what private property is to be taken for public use and also set the rule of compensation. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). Instead, the determination of just compensation is a judicial inquiry. *Id.* Thus, the second question presented for review is:

2. Whether the court of appeals' ruling comports with this Court's ancient rule where:

   a. Congress not only authorized the taking but also capped the amount of compensation due below market value (or any judicially recognized proxy); and

   b. The court of appeals deferred to an agency determination of just compensation based on the statutory cap and rejected as "irrelevant" a private property owner's evidence of market value.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties to the proceeding before the United States Court of Appeals for the Eleventh Circuit were as follows: Alabama Cable Telecommunications Association, American Electric Power Service Corporation, Comcast Cablevision of Dothan, Inc., Commonwealth Edison Company, Cox Communications Gulf Coast, L.L.C., Duke Energy Corporation, Florida Cable Telecommunications Association, Inc., Gulf Power Company, and PECO Energy Company.

Alabama Power Company is a wholly-owned subsidiary of The Southern Company.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alabama Power Company ("APCo") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 311 F.3d 1357 (11th Cir. 2002) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-24a. The court of appeals' orders denying the petitions for rehearing and rehearing en banc are unpublished, but are reproduced at Pet. App. 97a-99a. The principal orders of the Federal Communications Commission ("FCC") are *In*

the Matter of Alabama Cable Telecommunications Association v. Alabama Power Company, reported at 15 FCC Rcd. 17,346 (2000) (Pet. App. 87a-96a) and *In the Matter of Alabama Cable Telecommunications Association v. Alabama Power Company*, reported at 16 FCC Rcd. 12,209 (2001) (Pet. App. 25a-86a).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment in this action on November 14, 2002. The court of appeals denied timely filed petitions for rehearing and rehearing en banc on January 8, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1993 & Supp. 2002).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The Pole Attachment Act, 47 U.S.C. § 224 (1994 & Supp. IV 1998), is set forth at Pet. App. 100a-105a.

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

In *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 n.6 (1987) ("*Florida Power*"), this Court reserved for review the constitutional issues embedded in the Pole Attachment Act in the event that "the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements" with cable companies. (internal citation omitted). The Telecommunications Act of 1996 created the precise scenario reserved for review in *Florida Power* by providing mandatory access to a utility's pole space. *See* Pet. App. 100a-105a. This Just Compensation

Clause case squarely raises the central issues reserved by the Court in *Florida Power*.

Additionally, this petition focuses on the court of appeals' departure from this Court's black-letter rule of law that fair market value is the appropriate standard of compensation in a *per se* takings case-a constitutional issue which very recently divided this Court in *Brown v. Legal Foundation of Washington*, No. 01-1325, 2003 WL 1523550 (Mar. 26, 2003) (5-4 opinion) ("*Brown*").

In this case, the court of appeals held that APCo's utility pole space is essentially valueless. The court of appeals created a new category of tangible private property that it labeled "nonrivalrous" (*i.e.*, not subject to competitive uses), and found that the taking of "nonrivalrous" property requires no compensation (just or otherwise) for the actual property taken. Instead, the court sanctioned a rule that requires cable companies to merely reimburse a utility for the costs associated with preparing its property to be taken.

1. The 1978 Act.

In 1978, the cable industry was successful in lobbying Congress to enact the Pole Attachment Act (47 U.S.C. § 224) ("Act"). The Act authorized the FCC to regulate rates charged on voluntary pole attachment leases. The rate structure fell within the narrow range of: (1) a minimum of the additional costs incurred by the utility in providing pole attachments (*i.e.*, marginal costs) and (2) a maximum of an allocable share of each pole. Pet. App. 102a-103a (§ 224(d)) (the "Cable Rate"). The Cable Rate requires cable companies to pay only for the costs of making the pole ready for the attachment and for a small allocation of the costs of the usable portion of the pole (where attachments can be placed). The Act does not require cable companies to pay a direct allocation of the costs of the unusable space on a pole. Unusable space constitutes the vast majority of the pole, including

the portion of the pole extending from the attachments to the ground and the portion sunk underground, both of which serve the sole purpose of supporting all of the elevated attachments and providing the necessary vertical clearances.

Congress noted that the statutory methodology provided cable companies with "a more favorable rate for attachments than other telecommunications service providers." H.R. Rep. No. 104-204, 104th Congress, 2d Sess., at 92 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58; *see* Pub. L. No. 95-234, 47 U.S.C. § 224 (1978). However, Congress intended for the beneficial rate to "spur the growth of the cable industry, which in 1978 was in its infancy." H.R. Rep. No. 104-204, at 91-92, 1996 U.S.C.C.A.N. at 58; *see also* S. Rep. No. 95-580, at 12-14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 120-23. Congress recognized that the cable industry would undergo "changed conditions," and warned that the rate-setting methodology formulated by the FCC would have to be modified to ensure that it accounted for these "changed conditions." S. Rep. No. 95-580, at 21, 1978 U.S.C.C.A.N. at 129. Despite remarkable changes in the cable television industry, the 1978 Cable Rate survives today, unchanged.

2. *Loretto* And *Florida Power*.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court considered a New York statute that required property owners to allow cable companies to attach their lines to real property in exchange for payment set by a state commission. The Court held that the cable company's government-authorized attachment of cable lines and equipment to the owner's real property was a "permanent physical occupation of property . . . [a] taking" requiring just compensation. *Id.* at 441.

Five years later, in *Florida Power*, this Court held that the *Loretto* physical taking analysis did not apply to voluntary pole attachment leases under the 1978 Act. Nonetheless, the

Court expressly stated: "We do not decide today what the application of *Loretto* would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." 480 U.S. at 251 n.6 (internal citation omitted).

3. Cable Companies Flourish Under The Subsidized Rate.

Within this climate of cable attachments subsidized by artificially low rates, Congress' vision of "wider development of cable television service to the public" was realized. S. Rep. No. 95-580, at 14, 1978 U.S.C.C.A.N. at 122. America's cable industry is now oft-characterized as an "oligopoly," ultimately controlled by five or six large companies, some of which (*e.g.*, Time Warner and AT&T) dwarf even the nation's largest electric utilities.[1] *See* Whitmore, *Congress, the U.S. Supreme Court and Must-Carry Policy: A Flawed Economic Analysis*, 6 Comm. L. & Pol'y 175, 212 (2001) ("the industry is controlled by the top 100 cable firms, which serve 99.4% of all basic cable subscribers . . . [t]he top 100 cable systems are . . . overwhelmingly controlled by the top six cable companies."); Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 Cardozo Arts & Ent. L.J. 491, 586-87 (1999) (describing "media industries" as an "oligopoly model" and citing AT&T's purchase of TCI and

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[1] Time Warner and AT&T were both complainants in the FCC proceedings resulting in the orders reviewed by the court of appeals. At the time of the underlying FCC filings, Time Warner was the largest cable operator in the United States. APCo's Answer to Stay, Ex. 6, p. 1. Time Warner's 1999 revenue from its cable operations totaled $6,111,000,000. *Id.* By contrast, APCo's 1999 revenue from all operations was only $3,385,474,000. *See* Form 10-K of Alabama Power Company, at II-58 (Feb. 13, 2002), *available at* http://www.sec.gov/Archives/edgar/data/3153/000009212202000045/Form10k.txt.http://www.sec.gov/Archives/edgar/data (last visited April 1, 2003).

"effort[s] to consolidate cable operations and integrate telephone service into the cable infrastructure"). One cable industry analyst explained that cable companies "have morphed into two-way broadband behemoths . . . with new-found size and scale . . ." APCo's Response to Complaint, ¶ 27, p. 22 (citing *The Cable TV Financial Databook 2000*, Paul Kagan Associates, Inc., at 7).

4. The 1996 Amendments To The Pole Attachment Act.

As part of the Telecommunications Act of 1996, Congress amended the Pole Attachment Act in two ways: (1) to give cable and telecommunications attachers a mandatory right of access to a utility's pole network; and (2) to create a separate rate structure for telecommunications attachers ("Telecom Rate"). Pet. App. 103a-104a (§§ 224(e)-(f)). Unlike the Cable Rate, which Congress did not modify, the Telecom Rate included allocations for both the usable and unusable space on the pole. *Id.* (§ 224(e)). By authorizing the mandatory taking of space on utility poles and directing the FCC to charge two different rates (one still "favorable" to cable companies) for the exact same pole space taken, the 1996 amendments set the stage for utility companies to raise the constitutional questions reserved for review in *Florida Power*.

5. APCo Implements A Just Compensation Price.

A facial challenge to the 1996 amendments resulted in the court of appeals holding that the mandatory access provisions constituted a physical taking under *Loretto*. *See Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power*"). The court of appeals refused, however, to find the taking unconstitutional on the grounds that the issue of just compensation was unripe. Accordingly, APCo developed a revised pole attachment charge (applicable to all attaching entities) that was consistent with this Court's just compensation jurisprudence. APCo's price for fiscal year 1999

($38.81 per pole, per year) was computed by using current replacement costs (instead of the FCC-imposed historical costs) and allocating costs associated with both the usable and unusable space on the poles (as Congress had done with the Telecom Rate). The FCC's Cable Rate for the same period was $6.30 per pole. Although markedly higher than the historically favorable Cable Rate, APCo's charge was more in line with its unregulated rate charged to, and voluntarily paid by, incumbent telephone companies (which ranged from $25.00-$40.00 in 1999). APCo's Response to Complaint, Ex. A, ¶ 14.

6. APCo's Challenge To The Cable Rate.

On June 23, 2000, the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc. (collectively "ACTA") filed a pole attachment complaint with the FCC challenging APCo's revised pole attachment charge. APCo submitted evidence justifying its replacement cost methodology (as a proxy to fair market value), including expert appraisal testimony. On September 8, 2000, the FCC's Cable Bureau (relying principally on regulatory rate-making cases) ruled in favor of ACTA, holding that the statutory rate was constitutionally sufficient and stating that it would not consider a higher charge under any circumstance. Pet. App. 90a-91a, 94a, n.17 (¶¶ 3, 7, n.17).[2] Pursuant to 47 U.S.C. § 402(a) (providing for judicial review of FCC orders), APCo appealed the FCC Cable Bureau's decision to the United States Court of Appeals for the Eleventh Circuit.

In reviewing APCo's challenges to the Cable Rate, the court of appeals agreed that the "FCC inappropriately focused

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[2] *See also Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 2001 FCC LEXIS 6145, at *7 (Nov. 14, 2001) (rejecting Georgia Power's just compensation evidence as "materials that purport to support an alternative methodology for calculating pole attachment rates, a methodology that has been rejected by the Commission").

on ratemaking cases." Pet. App. 15a-16a. The court of appeals also recognized that, while several proxies may be used to determine market value for purposes of just compensation, "[t]he appropriate alternative, whatever that may be, rarely countenances the use of historical cost, as several Supreme Court cases make clear." Pet. App. 16a.

Nonetheless, the court of appeals jettisoned all previously recognized market value proxies and instead adopted a novel theory: after reimbursement of the marginal costs of making a utility pole ready for the attachment of cable lines, a utility is entitled to no compensation for the pole space actually taken. Pet. App. 16a-18a. The court of appeals explained that a utility would be entitled to seek compensation for the actual pole space taken only if it could show with regard to each pole that: (1) the pole is at full capacity; and (2) either (a) another buyer of the space is waiting in the wings, or (b) the power company is able to put the space to a higher-valued use with its own operations. Pet App. 21a, 24a.

The court of appeals based its conclusion on the premise that APCo's pole space is "nonrivalrous"—a term the court defined as meaning "the use by one entity does not necessarily diminish the use and enjoyment of others." Pet. App. 18a. The court of appeals held that a utility would be entitled to something more than marginal costs only if a pole was crowded with lines because, according to the court, only when a pole is full and another entity wants to attach does "the government taking foreclos[e] an opportunity to sell space to another bidding firm—a missed opportunity that does not exist in the nonrivalrous scenario." Pet. App. 20a.

Although the court of appeals noted that it was charged with reviewing "constitutional challenges to agency orders *de novo*," (Pet. App. 15a), it ignored the record evidence that contradicts its finding that APCo's poles space is a valueless and unlimited resource. The court of appeals went so far as to hold, under inapplicable agency deference principles, that

the FCC was not "obliged to engage in detailed analysis of [APCo's] expert testimony" or APCo's proffered market value proxies. Pet. App. 22a-24a. As such, the court cast APCo's evidence aside as "irrelevant." *Id.*

REASONS FOR GRANTING THE WRIT

Introduction And Summary Of Reasons

This Court should grant this petition for certiorari to settle the specific constitutional questions reserved in *Florida Power.* These are important questions of first impression with national significance. Moreover, this case presents the Court with an opportunity to clarify the constitutional issue that divided this Court in *Brown*, 2003 WL 1523550 (5-4 opinion), *i.e.*, the continued viability of the black-letter rule that fair market value is the measure of compensation in physical takings cases. The continued synonymy of just compensation and fair market value is of national significance to all private property owners.

The court of appeals' decision abandoned this Court's well-settled takings jurisprudence by holding that after reimbursement of marginal costs (*i.e.*, the cost of preparing the property for use by the taker), certain tangible private property has no value. The panel created out of whole cloth a new just compensation analysis for what it called "non-rivalrous property"—a category of property heretofore unknown to takings jurisprudence. The court of appeals, to borrow from Justice Scalia's dissent in *Brown,* created "a novel exception to [this Court's] oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken." 2003 WL 1523550, at *14 (Scalia, J., dissenting).

This case presents questions of federal statutory and constitutional law that are important to multiple segments of several national industries: cable television, telecommu-

nications and public utilities (electric and other). Millions of dollars and millions of miles of utility pole networks are impacted. The issue arises out of what the court of appeals acknowledged was "monumental" federal legislation (the 1996 Telecommunications Act) that implemented "sweeping changes" in the relationship between the parties at issue in this case. Pet. App. 5a, 7a. This Court already has reviewed the changes made in the 1996 Act twice. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*"). In *Iowa Utilities Board*, this Court expressly noted the Act's importance as "a piece of legislation that profoundly affects a crucial segment of the economy worth tens of millions of dollars." 525 U.S. at 397.

The issues presented have importance beyond the parties to this case. Merely by labeling property as "nonrivalrous," the court of appeals concluded that the government can take private property for public use and, after reimbursement of "marginal costs," pay nothing for it so long as the property was unused, vacant, or situated such that the owner's core use can continue. If allowed to stand, the court of appeals' holding will be applied in other contexts with potentially alarming results for all private property owners. Such a departure from "80 years of [this Court's] precedent" "equat-[ing] just compensation with the fair market value of the property taken" can only lead to "disastrous" results. *Brown*, 2003 WL 1523550, at *14, *15, *19 (Scalia, J., dissenting).

For example, suppose Congress, as part of the Telecommunications Act of 1996, not only granted cable and telecommunications companies a mandatory right of access to utility poles, but also granted them a mandatory right of access to any other private property needed to run their cables. Further, suppose a cable company exercised this mandatory right of access for the purpose of constructing a one-mile underground corridor which passed through a privately owned field. Under the court of appeals' analysis,

that cable company would assert that its underground occupation of the property is "nonrivalrous" because its use of the property does not interfere with the property owner's use and enjoyment of the remainder of his property. Under the court of appeals' analysis, the cable company asserts that it pays nothing for the property after reimbursing the landowner for the marginal costs associated with the taking (such as the costs of digging and burying the cable). This result is absurd. Prior to the court of appeals' ruling, no one, including the cable companies and the federal government, would have questioned that the landowner is entitled to something more than the marginal costs associated with the taking.

In fact, AT&T, one the complainants in the FCC proceedings below, recently settled a series of class action lawsuits brought by private landowners on whose land AT&T had buried fiber optic cables on abandoned railroad rights-of-way. In at least one of these settlements, AT&T paid an average of $45,000 per linear mile for its attachments. *See* Sunderland, *Rights-of-Way Rifts Sidetrack Long Distance Carriers,* Phone+, at ¶ 5 (Sept. 1999), *available at* http://www.phoneplusmag.com/articles/991carri.html (last visited April 1, 2003). If AT&T's access to the subject property had been through congressionally authorized condemnation rather than private negotiation, the resulting compensation should be no different. Under the court of appeals' analysis, however, the result would be alarmingly different.[3]

Finally, the determination of just compensation is a judicial function. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). Congress is prohibited from

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[3] The federal government is also very familiar with the value of communications rights-of-way. In fact, the court of appeals' ruling conflicts directly with the federal government's own practice of charging "market value" when it leases its own property for fiber optic attachments in government rights-of-way. *See* pp. 20-23 *infra.*

deciding (on a political basis) what property may be taken and, at the same time, setting a binding rule of compensation. The *Monongahela* rule rests upon principles of separation of powers and due process. In this case, APCo was subjected to a congressionally imposed and judicially sanctioned procedural whipsaw that resulted in the court of appeals calling APCo's just compensation evidence "irrelevant" and "hardly warrant[ing] an evidentiary hearing." Pet. App. 24a. Here, Congress' rule has become a binding rule of compensation without any judicial review of the evidence. This Court's ancient principle of law established in *Monongahela* has been ignored.

Once again borrowing the words of Justice Scalia, the court of appeals' ruling that APCo is "not entitled to the market value of [its]confiscated property has no basis in law." *Brown*, 2003 WL 1523550, at *19 (Scalia, J., dissenting). This Petition should be granted.

I. THE COURT OF APPEALS' DECISION DEPARTS FROM THIS COURT'S WELL-DEFINED BODY OF TAKINGS LAW.

In a long line of cases, this Court has defined the term "just compensation" as the "full monetary equivalent of the property taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970) (citing *Monongahela*, 148 U.S. at 326); *accord United States v. Miller*, 317 U.S. 369, 373 (1943). The full monetary equivalent is generally determined by the "market value" of the property on the date it is appropriated. *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001) ("When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value."); *see also Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979); *Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting). This Court has wisely maintained uniformity in just compensation jurisprudence by employing

the familiar hypothetical "willing buyer/willing seller" standard to define "market value." *Kirby Forest*, 467 U.S. at 10; *564.54 Acres of Land,* 441 U.S. at 511; *Miller,* 317 U.S. at 374. Although the market value standard is applied in the vast majority of takings cases, it is not universal. *Miller*, 317 U.S. at 374; *see also Brown*, 2003 WL 1523550, at *15 (Scalia, J., dissenting). For example, where market value is too difficult to determine or where the property rarely is sold in the market, this Court mandates a market value "proxy." *564.54 Acres of Land*, 441 U.S. at 512.

Instead of following this Court's well-defined body of takings law, the court of appeals invented a zero value/ "marginal cost" proxy for market value—a standard that prior thereto had never been recognized in any physical takings case. The court of appeals thus created "a novel exception to [this Court's] oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken." *Brown*, 2003 WL 1523550, at *14 (Scalia, J., dissenting).

A. The Court Of Appeals Inappropriately Applied Rate Regulation Principles To A Physical Takings Case.

This is a takings case; it is not a rate regulation case. The distinction is significant. *Palazzolo*, 533 U.S. at 628 ("Direct condemnation . . . presents different considerations from cases alleging a taking based on a burdensome regulation."); *Brown*, 2003 WL 1523550, at *10 ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries.'") (citations omitted). In rate regulation, the rate must simply not be "so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). In takings cases,

the bar is much higher and uncompromising, *i.e.*, "the full and perfect equivalent in money of the property taken." *Miller*, 317 U.S. at 373; *see also Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting). There is a "broad zone of reasonableness" associated with rate regulation. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968); *see also Brown*, 2003 WL 1523440, at *10 ("careful examination and weighing of all relevant circumstances"). There is no such "zone" in just compensation cases, and policy-driven balancing of interests is prohibited. *See, e.g., 564.54 Acres of Land*, 441 U.S. at 512; *Brown*, 2003 WL 1523550, at *10 ("'When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'") (quoting *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). As such, this Court's analysis of the Cable Rate in *Florida Power* (applying regulation standards) no longer applies. The issues reserved by this Court in *Florida Power* must now be addressed under this Court's "straightforward . . . *per se* [takings] rules." *Brown*, 2003 WL 1523550, at *10.

1. *Mere Reimbursement Of Marginal Costs Is Not Just Compensation.*

The court of appeals itself recognized the importance of the above distinction when it criticized the FCC for "inappropriately focus[ing] on ratemaking cases," and then acknowledged, "[w]hen a physical taking is at issue . . . a different analytical hat must be worn." Pet. App. 15a-16a. The court of appeals even noted that "[t]he Supreme Court made this analytical distinction clear in [the *Florida Power* case]." *Id.* Yet, the court of appeals itself failed to change hats and thus committed the very same constitutionally critical error.

The FCC uses historical costs in its application of the statutory Cable Rate. Pet. App. 78a-79a (¶¶ 66-67). Although upheld by this Court under rate regulation principles in *Florida Power*, the historical cost measure is much-

maligned when applied in a takings context. The court of appeals' decision even noted that a just compensation award based upon a "backwards-looking" "historical cost" proxy "is rarely countenance[d] . . . as several Supreme Court cases make clear." Pet. App. 16a-17a (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 130 (1950); *United States v. Toronto Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949)). In *Toronto*, the Court called historical (or "original costs") a "false standard of the past." 338 U.S. at 403; *see also Olson v. United States*, 292 U.S. 246, 255 (1934) ("It is the property and not the cost of it that is safeguarded by [the] Constitutio[n].") (quoted in *Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting) (alterations in original)). Nonetheless, the court of appeals went beyond even the "false standard of the past" and brought to life a zero value/marginal cost standard.

"Marginal cost" has never been a recognized proxy for market value and cannot be found in any takings decision issued by this Court or any federal court of appeals. The court of appeals cited *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986), for the proposition that marginal costs can, in "some cases," constitute just compensation. APCo has been unable to locate even one such case, much less "cases." Even the *Metropolitan* case - the *only* authority cited by the court of appeals to support its marginal costs approach—is not a takings case; it is a rate regulation case. Thus, after rejecting as "inappropriate" any rate regulation analysis, the court of appeals relied exclusively upon a rate regulation case.

2. *The Court Of Appeals' Holding Creates A Constitutional Non-Sequitur.*

The most glaring example of the court of appeals' own ratemaking analysis is its footnote conclusion that the disparate rates for the taking of identical pole space (*i.e.*, the Cable Rate vs. the Telecom Rate) is "irrelevant" due to

Congress' "legislative discretion." Pet. App. 22a, 21a, n.23. Legislative discretion cannot trump the protections afforded by the Fifth Amendment. *Gulf Power*, 187 F.3d at 1331 ("However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property."). Although the Telecom Rate is not an issue in this proceeding, the existence of a higher rate for attachments virtually identical to cable attachments—occupying an identical amount of space—is constitutionally significant. At a minimum, the disparity between the two rates demonstrates: (1) the existence of more complete compensation to pole owners; (2) the irreconcilable incongruity between principles of rate regulation and constitutional standards of just compensation; and (3) immediate, identifiable and rivalrous "lost opportunity."

Under the record evidence in this case, if a cable company takes one foot of APCo's pole space, the Cable Rate limits APCo's recovery to $6.30. Pet. App. 90a-91a (¶ 3). If a telecommunications company takes that same one foot of pole space, the telecommunications company would pay the significantly higher Telecom Rate. *Id.* The only difference is that the Cable Rate's so-called "allocation" does not include a fair share of the unusable space supporting the elevated portion of the pole on which cables can be attached. The Telecom Rate, however, incorporates an "equal apportionment" of unusable space. Pet. App. 103a (§ 224(e)(2)). APCo's undisputed evidence was that there is absolutely no difference between the nature of the attachments and their respective impacts on APCo (cost or otherwise). APCo's Response to Complaint, Ex. A, ¶ 6. The only distinction between the two attachments is the entity taking the property. The favorable legislative/administrative treatment given to cable companies in this regard is indefensible in a just compensation case.

B. The Court of Appeals Erroneously Re-Wrote the "Market Value" Standard.

Most troubling for all private property owners, the court of appeals abandoned the *hypothetical* willing buyer/willing seller standard, instead requiring that APCo prove the existence of an *actual* buyer "waiting in the wings" before it can claim that its property has any value. Pet. App. 21a, 24a. In so doing, the court of appeals has fundamentally re-written the market value standard.

This Court consistently has defined "market value" as "the price at which the asset would change hands between a hypothetical willing buyer and willing seller, neither being under any compulsion to buy or sell." *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 570 (1993) (defining "market value" in a tax case); *see also Toronto*, 338 U.S. at 402 (discussing . . . market price in relation to the "hypothetical buyer"). Following this Court's precedent, a condemnee has not been required to show the existence of an actual seller and buyer or the existence of an actual market. *See, e.g., Kimball Laundry Co. v. United* States, 338 U.S. 1, 6 (1949) ("But since a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what the equivalent would probably have been had a voluntary exchange taken place."). Instead, "a showing of potential sellers and buyers in a potential market will suffice." *See, e.g., South Bay Irrigation Dist. v. California—Am. Water Co.*, 133 Cal. Rptr. 166, 184 (Cal. App. 1976); *see also Palazzolo*, 533 U.S. at 625 (discussing zoning restrictions that have to be considered when valuing "hypothetical uses").

The court of appeals' ruling has changed this long-standing *hypothetical* paradigm. Now, any private property owner whose land is condemned by the government must scramble immediately to market its property. The property owner must

also successfully locate an actual buyer in order to have the benefit of the traditional standard.

C. By Denying APCo Judicial Review Of Its Evidence Supporting Its Just Compensation Price, The Court Of Appeals Violated The Rule In *Monongahela*.

This Court held in *Monongahela* that the determination of just compensation is ultimately a judicial function.

> By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or *even what shall be the rule of compensation.* The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327 (emphasis added); *see also Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 368 (1936) ("The just compensation clause may not be evaded or impaired by any form of legislation.").

The court of appeals' holding in this case violates the separation of powers and due process concerns underlying *Monongahela* and its progeny in two separate respects.[4]

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[4] *Monongahela's* holding that the determination of just compensation is a judicial function remains the consistent and undiminished position of this Court. *Monongahela* was cited by Justice Scalia in a concurring opinion in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 748 (1997). The case was cited with approval in the Court's opinion in

First, the 1996 Amendments to the Act effected a taking of utility property. Yet, Congress left in place as the "rule of compensation" the old Cable Rate—an outdated policy-based rate designed to expand cable companies through subsidized rates. The FCC has imposed the Cable Rate as a binding rule of compensation. Pet. App. 90a-91a (¶ 3) ("In order to calculate a reasonable pole attachment rate . . . we apply our Cable Formula."). Thus, in this instance, Congress not only determined both "what private property is needed for public purposes . . . a question of a political and legislature character," but also impermissibly set "the [binding] rule of compensation." *Monongahela*, 148 U.S. at 327.

Second, in the context of the Act, the Eleventh Circuit previously ruled that *Monongahela* is satisfied where the FCC sets the amount of compensation due, subject to "judicial review." *Gulf Power*, 187 F.3d at 1333 (citing *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n*, 95 F.3d 1359, 1369 (7th Cir. 1996)). Here, even as interpreted by *Gulf Power* and *Wisconsin Central*, the holding in this case violates the *Monongahela* mandate. APCo's just compensation evidence did not receive "judicial review." Instead, the court of appeals sanctioned a process whereby APCo's evidence concerning just compensation was cast aside and labeled "irrelevant." The court of appeals went so far as to erroneously characterize APCo's evidence concerning just compensation as "a legal issue that *hardly warrants an evidentiary hearing*." Pet. App. 24a (internal citations omitted) (emphasis added). That is not the "judicial inquiry" contemplated by this Court in *Monongahela* or the "judicial

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PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 83 n.7 (1980). In *United States v. Sioux Nation of Indians*, 448 U.S. 371, 417 n.30 (1980), the Court stated that *Monongahela* stands for "the ancient principle that the determination of the measure of just compensation for a taking of private property is a judicial and not a legislative question." (quotations omitted).

review" envisioned by its progeny. *See Baltimore & Ohio R.R.*, 298 U.S. at 368-69 ("When [a condemnee] appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. *That includes the right to introduce evidence and have judicial findings based upon it.*") (emphasis added).

Due process demands that APCo receive a judicial hearing in which its evidence is considered. *Walker v. Hutchison*, 352 U.S. 112, 115 (1956) ("It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation."). Moreover, the hearing must be before an independent forum. *See, e.g., Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *Bragg v. Weaver*, 251 U.S. 57, 59 (1919). APCo's unfulfilled quest for just compensation, through the FCC (where Congress' binding rule was enforced) and the court of appeals (where the court turned a blind eye toward APCo's evidence), does not comport with due process as defined by this Court.

II. THE COURT OF APPEALS' RULING CONFLICTS WITH THE FEDERAL GOVERNMENT'S PRACTICE OF CHARGING "MARKET VALUE" FOR FIBER OPTIC ATTACHMENTS IN PUBLIC RIGHTS-OF-WAY.

The court of appeals' ruling, supporting the FCC's position, that APCo's utility pole space has no value conflicts with the government's practice in leasing its own rights-of-way. Fiber optic companies of all types (*i.e.*, cable, telecommunications and internet service providers) have sought access not only to utility poles, but also to private land and

public rights-of-way (such as highways, bridges, ocean floors, and mass transit easements). As a result,

> [f]ederal agencies such as the United States Department of Transportation, the United States Department of Interior . . . , the United States Department of Agriculture . . . and the National Oceanographic and Atmospheric Administration ("NOAA") have all been actively engaged in assessing value for rights-of-way for years.

TeleCommunity Alliance, *Valuation of the Public Rights-of-Way Asset,* p. 1, n.1, *available at* http://www.telecommunityalliance.org/images/valuation2002.pdf (last visited April 1, 2003).

Not surprisingly, when leasing its own rights-of-way, the federal government imposes a "fair market value" standard. *See* 43 C.F.R. subt. 2803 (2003) (addressing valuation of rights-of-way and requiring that the government receive fair market value for their use). Indeed, "a whole industry has developed to provide federal, state, and local governments, as well as individual land-owners, with valuation of their rights-of-way." *TeleCommunity*, p. 1 n.1.

As just one example, in valuing the price to be charged fiber optic companies to bury cable in underwater rights-of-way, NOAA discussed various valuation methodologies (none of which being even remotely akin to "zero value/ marginal costs") and concluded that "fair market value" should be charged. *See Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries*, NOAA (Aug. 2001) ("NOAA Report"). The NOAA Report explained that rights-of-way values "have been rapidly growing over the last fifteen years" as telecommunications and cable companies competed for space to string their cables. *Id.* at 18. The report identified several relevant market transactions supporting its "fair market value" standard:

> 1. A 1988 United States Department of Transportation market price of $31,250.00 per mile for non-exclusive

rights-of-way (citing *Shared Resources: Sharing Right-of-Way for Telecommunications*, U.S. Dept. of Transp. (April 1996));[5]

2. A 1994 Bureau of Reclamation market price of $50,000 per mile for non-exclusive interstate rights-of-way;

3. A San Francisco, California, annual rent of $350,000 per mile for a seven mile right-of-way that crossed the grounds of the Presidio and the Golden Gate Bridge;

4. An Austin, Texas, price of $126,316 per mile for an easement of thirty-one miles of transit authority right-of-way; and

5. The Massachusetts Turnpike Authority's price of $112,477 per mile per year (plus a fee for each fiber deployed) for a fifty mile right-of-way. The parties agreed that the additional fiber fees had the potential to raise the level of compensation to $1 million per year.

Id. at 18-20.

The court of appeals' characterization of APCo's pole space as "nonrivalrous" and as having *zero value* conflicts directly with the current market realities and the established practice of the federal government in valuing its own property for the exact same purpose—running cables. If federal and state owned rights-of-way are "rivalrous" and valuable, so too are those owned and controlled by electric utilities.[6] APCo's

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[5]Such market value transactions are possible because the statutory Cable and Telecom Rates are not imposed on railroads, electrical cooperatives and federal/state owned utilities. Pet. App. 100a (§224(a)(1)).

[6] The active market for communications corridors is not limited to governmental rights-of-way. Several railroad companies charge linear foot attachment rates that equate to pole attachment rates of $23 in rural areas and $1,257 in urban areas. APCo's Response to Complaint, Ex. B, pp. 8-17, 29-30. Even the complaining cable companies use the active market rates when it benefits them. For example, Comcast owns cellular towers and typically charges market rates for attachments ranging from

property has a fair market value, such value is determinative under the Just Compensation Clause, and Congress cannot statutorily ignore it under *Monongahela*. *See* pp. 18-20, *supra*.

III. THE COURT OF APPEALS' RULING IS FUNDAMENTALLY ERRONEOUS.

The court of appeals recognized the novelty of its ruling by describing APCo's argument as one to which it "might ordinarily be sympathetic," but for "one known fact, one unknown fact, and one legal principle." Pet. App. 17a and n.20. As it turns out, the court of appeals applied a wholly irrelevant fact and created an erroneous fact in imposing upon APCo its newly created "legal principle." The record below, cast aside by the court of appeals as "irrelevant," simply does not square with the court of appeals' analysis.

A. The "Known Fact" That Cable Companies Pay "Make-Ready" Costs Is Irrelevant To A Takings Analysis.

The so-called "known fact" that served as the springboard for the court of appeals' novel analysis is that cable companies pay make-ready costs before actually physically occupying APCo's property. The FCC defines make-ready as "the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities." Pet. App. 93a (n.28). That is, make-ready costs are nothing more than reimbursement for the actual expenditures incurred by APCo

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$18,000-$21,600 annually. *Id.*, p. 11. Yet, recently, the FCC ruled that electric utilities were limited to the statutory cost based recovery for attachments on certain transmission structures. *Omnipoint v. PECO Energy Co.*, PA-97-002, 2003 FCC LEXIS 1529, at *7 (Mar. 25, 2003). The *Omnipoint* ruling further demonstrates that unless this Court intervenes, the FCC will continue to take private property for the "larcenous benefi[t]" of cable and telecommunications companies. *Brown*, 2003 WL 1523550, *19 (Scalia, J., dissenting).

to alter its facilities to safely allow the attachment. The fact that APCo "received more than a million dollars" as reimbursement for expenses that would never have arisen but for its duty to accommodate the additional facilities has *nothing* to do with the value of the space permanently occupied by the attachment. *See Olson*, 292 U.S. at 255 ("It is the property and not the cost of it that is safeguarded by [the] Constitutio[n].") (quoted in *Brown*, 2003 WL 1523550, at *17 (Scalia, J., dissenting) (alterations in original)).

B. APCo's Pole Space Is Not "Nonrivalrous."

The court of appeals described "nonrivalrous" property as property that may be used by one entity without "necessarily diminish[ing] the use and enjoyment of others." Pet. App. 18a. According to the court, the "common example" of a "nonrivalrous good" is the "national defense." Pet. App. 18a. APCo's poles are in no way like the amorphous and intangible national defense. APCo's pole space is physical, tangible property that, once taken, is lost to APCo.

The court of appeals' designation of APCo's property as "nonrivalrous" is premised on its erroneous assumption that APCo's poles make up a hypothetical "network of poles that reaches one million feet into the sky." Pet. App. 18a-19a. To the extreme contrary, the record is clear that APCo's "network" is a finite and limited resource. The average pole in APCo's network is only 40 feet tall, with only 10.5 feet of space that is "usable" for non-core purposes. APCo's Response, Ex. A, ¶ 8. With an average of 7 feet required for electric supply facilities, and 2.5 feet for the ILEC (*e.g.*, BellSouth), there is only one foot available for cable and non-ILEC telecommunications attachments (those covered by the Act). The FCC presumes that each cable/telecom attachment occupies 1 foot of space. Thus, on the average pole, the limited communications space accommodates only one cable or non-ILEC telecommunications attachment.

In the court of appeals' own words, "if crowded, [APCo's] pole space becomes rivalrous." Pet. App. 20a. The record facts establish that APCo's pole space is finite and indeed crowded. Once a cable company attaches (which obviously has happened in this case), APCo's limited communications space is lost (on average). The record facts (ignored by the court of appeals as "irrelevant") squarely refute the court of appeals' conclusion that APCo's poles are "nonrivalrous." APCo's pole space is no more "nonrivalrous" than the hypothetical private field (*see* pp. 10-11, *supra*) and is clearly different than the intangible "national defense."

The court of appeals' "nonrivalrous" analysis was borne out of abstract economic theory and in theory it should remain.[7]

C. APCo Has Identifiable And Valuable Lost Opportunities.

The court of appeals concluded that APCo could not seek any compensation for the actual pole space taken unless it can prove "with regard to *each* pole that (1) the pole is at full capacity [elsewhere characterized by the court of appeals as "crowded"]; and (2) either (a) another buyer of the space is waiting in the wings or (b) [it] is able to put the space to a

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[7]Although it cannot be found in any published opinion (and certainly not in any physical takings case), the concept of "nonrivalrous" property has been the subject of scattered economic and intellectual property writings. Indeed, the very language used by the court of appeals seems to have its genesis in a comment entitled *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*. *See* Crafton, 32 Emory L.J. 857, 865 (1983) ("Public goods also are characterized by nonriavlry in consumption. Nonrivalry means that consumption by one individual does not reduce the benefits enjoyed by, or increase the cost to, another user or consumer . . . . The paradigm (or central) example of a pure public good is national defense.").

higher valued use with its own operations." Pet. App. 21a (emphasis added). According to the court of appeals, unless APCo could meet those requirements there is no "lost opportunity." *Id.* Putting aside the foundational errors facially apparent from this new heightened standard that was imposed retroactively upon APCo[8] and the reality that APCo's pole space is "crowded," the court of appeals is simply wrong in finding no lost opportunities.

As explained by APCo's expert appraiser (which, as noted above, was ignored by the court as being "irrelevant"), APCo has lost the following identifiable and valuable opportunities: (1) to sell, at a market rate, the pole space occupied by the cable company;[9] (2) to instead sell that limited pole space at an unregulated rate to a non-cable or non-telecom business that needs to run fiber optic cable; (3) to deny all third party attachers access to its poles in favor of a cable/telecom affiliate that could use the space to compete with the cable

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[8] First, as discussed *supra* at pp. 17-18, takings law has never required proof of an actual buyer—only a hypothetical buyer. Second, it is fundamentally unfair to uphold the FCC's rate (which is based upon numerous *presumptions* about the average pole), yet require APCo to make *factual* showings "with regard to *each* pole." Pet. App. 20a-21a. There are approximately 380,000 APCo poles at issue in this case. APCo's Response, Ex. A, Tab 1, ¶ 6.

[9] The court of appeals hypothesizes about a government run cable company and says "it would not make sense for [a utility] to say, '[e]ven though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell to the government at what we deem the 'full market price' of this pole space.'" Pet. App. 19a. Though the point of this hypothetical is unclear, it is undisputable that the government cannot "depress property values, directly or indirectly, by interfering with the property owners' rights to use their land, and then take advantage of such depression to reduce the price which it must pay for the property." *Assateague Island Condemnation Cases v. 222.0 Acres of Land*, 324 F. Supp. 1170, 1180 (D. Md. 1971) (citing *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961)). If allowed to stand, the court of appeals' opinion will have effected just that result.

companies;[10] and (4) *at a bare minimum,* the opportunity to deny cable companies access to its poles and instead only sell its limited pole space to telecommunications entities (at the statutory Telecom Rate which is significantly higher than the Cable Rate) (*see* pp. 15-16 *supra*). APCo's Notice of Supplemental Authority (Sept. 9, 2000), Second Affidavit of Henry J. Wise, MAI, p. 5. Thus, unlike the cash deposit that could not legally earn interest in *Brown*, APCo's pole space can and does earn rentals at rates substantial higher than the Cable Rate (imposed by Congress through the FCC).

CONCLUSION

The court of appeals' holding, that reimbursement of marginal cost with no compensation for the actual property taken provides APCo just compensation, is not only unprecedented, but also conflicts with well-established precedent of this Court. The only authority cited by the court of appeals in support of its holding is an inapposite rate-making case. With its nonrivalrous/marginal cost analysis, the court of appeals essentially ruled that the finite and limited space on APCo's network of poles has no value. The court of appeals' nonrivalrous label is flawed (even under its own analysis) and entirely inapplicable to APCo's tangible, private property. "Nonrivalry" and the physical occupation of tangible, private property are mutually exclusive concepts.

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[10] This is another critical analytical inconsistency in the court of appeals' opinion. The court of appeals seemed to recognize the value and the "incentive [utilities may have] to deny potential rivals the pole attachments they need," yet concluded there is no value in doing so. Pet. App. 8a. If APCo could, hypothetically, gain market advantage by excluding telecommunication attachers that compete with its subsidiaries, its incentive is monetary and, therefore, a lost opportunity. While APCo certainly is not seeking to engage in anticompetitive behavior or to seek what cable companies routinely label "monopoly rents," the market incentive it may have to do so must be a "rivalrous" use under the court of appeals' analysis.

The court of appeals' ruling impacts all public utility pole owners, thereby raising questions of exceptional national importance. Moreover, the court of appeals' departure from the time honored fair market value standard creates dangerous precedent for all property owners and should be resolved by this Court after a full briefing on the merits.

This Court was divided in *Brown*. The court of appeals' decision presents an opportunity for this Court again to address the synonymity of "just compensation" and "fair market value" to prevent misuse of the *Brown* ruling and avoid the "potentially far-reaching consequences" feared by Justice Scalia—*i.e.*, "disastrous" cases like this one. *Brown*, 2003 WL 1523550, at *16, *19 (Scalia, J., dissenting).

Respectfully submitted,

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April 4, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

Nos. 00-14763, 00-15068 and 01-13058

Nov. 14, 2002

ALABAMA POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, COMCAST CABLEVISION OF DOTHAN, INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION,
Intervenors.

GULF POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION,
Intervenors.

ALABAMA POWER COMPANY AND GULF POWER COMPANY,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES,
Respondents,

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, COMCAST CABLEVISION OF DOTHAN, INC., *et al.*, AND AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, *et al.*,
Intervenors.

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

TJOFLAT, Circuit Judge:

As part of the Telecommunications Act of 1996, Congress amended the Pole Attachment Act of 1978 to give cable television companies the right to acquire space on the utility poles of power companies at rates established by a formula (the "Cable Rate")[1] promulgated by the Federal Communications Commission ("FCC" or "Commission"). *See* 47 U.S.C. § 224. Under the regulatory scheme, if the parties are unable to agree on the price, the cable company can seek relief in the FCC's Cable Bureau. In this case, the Cable Bureau, and on review, the FCC, rejected the price demanded by Alabama Power ("APCo") for a cable television company's mandatory right of access to its utility poles, and it ordered the parties to negotiate a price within the parameters of the Cable Rate. *See In the Matter of Ala. Cable Telecomm. Ass'n et al. v. Ala. Power Co.*, 16 FCC Rcd. 12,209 (2001). APCo, Gulf Power Company ("Gulf Power"), and several intervenors now ask us

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[1] The mathematical expression of the Commission's rules, found in 47 C.F.R. § 1.1409(e)(1), is as follows:

> Maximum Rate = (Space Occupied by Attachment / Total Usable Space) x Net Cost of Bare Pole x Carrying Charge Rate

to declare that the rate imposed by the FCC does not provide just compensation and therefore violates the Takings Clause of the Fifth Amendment. In essence, the petitioners are using this case as a vehicle to mount a challenge to the rate methodology set forth in 47 U.S.C. § 224(d)[2] and the FCC's implementation of the rate methodology in 47 C.F.R. §§ 1.1401 *et seq.* We hold that based on the particular facts of this case, the petitioners have failed to meet their burden of proof. We therefore deny the petitions for review.

The factual context of this case is difficult to comprehend without an understanding of the economic and legislative climate existing prior to the 1996 Act, as well as the history of Fifth Amendment litigation in the pole attachment context. Part I of this opinion provides this necessary background. Part II takes a detour from the primary focus of this case by addressing the standing and exhaustion issues presented. The heart of the case is found in part III, where we find that there has been no violation of the Takings Clause. Finally, part IV addresses arguments concerning the administrative process, such as whether the FCC acted in a way that is arbitrary and capricious, or whether it failed to provide the litigants with due process.

I.

Certain firms have historically been considered to be natural monopolies—bottleneck facilities that arise due to network effects[3] and economies of scale.[4] Such firms have

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[2] The rate for cable television attachments is prescribed in 47 U.S.C. § 224(d), which states: "[A] rate is just and reasonable if it assures a utility of recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of usable space which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."

[3] Network effects often enhance the monopoly position of firms that operate in industries where a large number of common customers is

historically included electric utilities, local telephone companies,[5] and oil pipelines. *See generally* Richard D. Cudahy, *Whither Deregulation: A Look at the Portents,* Ann. Surv. Am. L. 155 (2001). Firms in other markets frequently need access to these bottlenecks in order to compete. The "essential facilities" doctrine in antitrust law has often provided the legal remedy for such problems. *See, e.g., Otter*

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especially advantageous. *See* Stuart M. Benjamin, Douglas G. Lichtman, and Howard A. Shelanski, *Telecommunications Law and Policy* 616 (2002) ("All else equal, wouldn't you have a strong incentive to select the phone company that had the largest number of customers with whom you might want to converse? Once you join, can you see how this same phenomenon would increase the pressure on, say, your friends and family—which in turn would put pressure on their friends and family—to join the same phone network, thus increasing any monopoly tendency already at play in the market?"). The cost of competing with an incumbent firm in a network industry may well be insurmountable. As the Supreme Court recently explained: "A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the 'last mile' of feeder wire, the local loop, to thousands (or millions) of terminal points in individual houses and businesses." *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 122 S.Ct. 1646, 1662, 152 L.Ed.2d 701 (2001).

[4] Economies of scale typically arise when long-run average total cost declines as output increases. *See* Benjamin et al., *Telecommunications Law and Policy* 376 (2001). This attribute is common in industries where the initial fixed cost is very large and variable costs are comparatively slight. *Id.* The result is that "eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs." *Omega Satellite Products Co. v. Indianapolis,* 694 F.2d 119, 126 (7th Cir.1982) (Posner, J.).

[5] A central premise of the 1996 Act is that local exchange carriers (LECs) may not be natural monopolies after all. *See* Benjamin et al., *Telecommunications Law and Policy* 715 (2001) ("[P]olicymakers and entrepreneurs were ready to question the underlying assumption that local service should—or at least as a practical matter would—be provided by state-sanctioned monopolists.").

Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *see generally* Phillip E. Areeda & Herbert Hovenkamp, 3A *Antitrust Law* ¶ 772 (1996). Over the last several years, however, Congress has sought to codify forced-access regulations rather than resorting to judge-made principles of antitrust law. The most noteworthy effort in this vein was the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et. seq.* In that monumental legislation, Congress sought to break the hold of incumbent telephone monopolies and pave the way for local competition. As an intermediate step toward the end-game of facilities-based competition, Congress allowed competitive local exchange carriers (CLECs) to gain forced access to the unbundled network elements (UNEs) of incumbent local exchange carriers (ILEC) at regulated rates.[6] *See* 46 U.S.C. § 251(c)(3).

In another provision of the Act, Congress turned its attention away from the relationship between CLECs and ILECs and focused on the relationship between cable television companies and electric power companies. Power companies have something that cable companies need: pole networks. Concerned about the monopoly prices power companies could extract from the cable companies, Congress allowed cable companies to force their way onto utility poles at regulated rates. This regime was not entirely born in 1996, however. The only novel part of the 1996 Act was *forced* access. Pole attachments have in fact been regulated since 1978, and our story must therefore turn to an earlier date.

Since the dawn of the cable television industry, cable companies have attached their cables to utility poles owned by telephone companies and, more frequently, power

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[6] The rate formula promulgated by the FCC (known as "TELRIC") has been the source of several statutory and constitutional challenges. *See, e.g., Verizon Communications Inc. v. FCC,* 535 U.S. 467, 122 S.Ct. 1646, 1662, 152 L.Ed.2d 701 (2001).

companies. In the view of Congress, the costs of erecting an entirely new set of poles would have created an insurmountable burden on cable companies. As the owner of these "essential" facilities, the power companies had superior bargaining power, which spurred Congress to intervene in 1978. The Pole Attachment Act of 1978 gave the FCC authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" in any state that does not already have such regulations in place. 47 U.S.C. § 224(b)(1). The Act further provided that the minimum reasonable rate is equal to "the additional costs of providing pole attachments," while the maximum reasonable rate is to be calculated "by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." 47 U.S.C. § 224(d)(1).[7] Based on these guidelines, the FCC promulgated regulations that focused on the upper end of this range. Importantly, the 1978 Act did not *force* power companies to yield access; the regulated rates applied only if (and when) voluntary agreements were entered into. These regulations led to a constitutional challenge under the theory that, under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), they worked a *per se* physical taking without providing just compensation. This court partially agreed and held that the FCC's Order effected a taking of Florida Power's property. *Florida Power Corp. v. FCC,* 772 F.2d 1537, 1544 (11th Cir.1985). We

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[7] This rate formula, unchanged since 1978, was restated more clearly by the Supreme Court: "The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which cable is attached." *See FCC v. Florida Power Corp.*, 480 U.S. 245, 253, 107 S.Ct. 1107, 1113, 94 L.Ed.2d 282 (1987).

went on to hold, however, that the FCC, as an administrative agency rather than an Article III court, did not have the power to determine what is just compensation for purposes of the Fifth Amendment Takings Clause. *Id.* The Supreme Court reversed, holding that *Loretto* did not apply because the Act did not *require* power companies to give access to cable companies. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53, 107 S.Ct. 1107, 1111-12, 94 L.Ed.2d 282 (1987). The Court asserted, "[I]t is the invitation, not the rent, that makes [*Loretto*] different. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Id.* at 243, 107 S.Ct. at 1112. Therefore, the *per se* rule of physical takings did not apply, and the Court upheld the rate regulation under the "traditional" Fifth Amendment standard that applies to rate regulations: "So long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition." *Id.* (citing *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 53, 56 S.Ct. 720, 726, 80 L.Ed. 1033 (1936)). In sum, the Supreme Court found that there was no Fifth Amendment violation, and therefore did not address whether the initial determination of just compensation could be made by an administrative agency subject to judicial review. *Florida Power,* 480 U.S. at 254, 107 S.Ct. at 1113 n. 8.

Fast forward to 1996. As part of the sweeping changes Congress brought about through the Telecommunications Act of 1996, Congress amended the 1978 Act by giving cable companies a right of forced attachment. That is, power companies could not decline offers to attach at regulated rates, save for the statutory exceptions of insufficient capacity or some safety, reliability, or other engineering problem. *See* 47 U.S.C. § 224(f)(2).[8] This change to a forced-access

[8] A panel of this court recently used this statutory exception as the basis for vacating an FCC rule which forced power companies to enlarge

regime was perhaps spurred by new laws, consistent with the 1996 Act's vision of competition in all sectors of the data distribution business, that gave large power companies freedom to enter the telecommunications business rather than remain quarantined to the electricity business. Pub.L. No. 104-104, § 103 (1996). Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory. *See Southern Company v. FCC,* 293 F.3d 1338, 1341-42 (11th Cir.2002) ("Cable companies were fearful that utilities' prospective entry into the telecommunications market would endanger their pole attachments, as utilities would be unwilling to rent space on their poles to competing entities. Congress elected to address both of these matters in the 1996 Telecommunications Act."). In all other respects, however, the regulatory regime remained the same. Because of this statutory change—ever important in light of the Supreme Court's distinction of *Loretto* from *Florida Power*—power companies renewed their Takings Clause challenge.

In one case, the power companies took aim at the statute itself, alleging that it was facially unconstitutional because it took property without just compensation. The district court held that the amendment effected a *per se* taking, but granted summary judgment in favor of the FCC. *See Gulf Power Co. v. United States,* 998 F.Supp. 1386 (N.D.Fla.1998). In conclusory fashion, the court found the compensation to be "just," *id.* at 1386, and also held that the availability of judicial review by an Article III court rendered the initial

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pole capacity at the request (and expense) of attaching cable and telecommunications companies. *See Southern Company v. FCC,* 293 F.3d 1338, 1346-47 (11th Cir.2002). The panel could not reconcile the no-capacity excuse allowed under the statute with the forced build-out rules required under the FCC's regulations, and thus held the regulations to be *ultra vires.*

determination of just compensation by the agency constitutionally permissible, notwithstanding our earlier holding in *Florida Power,* 772 F.2d at 1544. We affirmed for different reasons, agreeing with the district court that the Act works a *per se* taking under *Loretto,* but that the Act provides an adequate process for obtaining judicial review.[9] *Gulf Power Co. v. United States,* 187 F.3d 1324 (11th Cir.1999) ("*Gulf Power I*"). However, we rejected the facial challenge, holding that the parties failed to show that no set of circumstances exist under which the Act would be valid.[10]

In another case, the power companies filed a petition for review in this court, seeking reversal of an FCC Order, *In re Implementation of Section 703(e) of the Telecommunications Act of 1996,* 13 FCC Rcd. 6777 (1999), that devised a formula for computing the attachment rent. *See Gulf Power Co. v. FCC,* 208 F.3d 1263 (11th Cir.2000) ("*Gulf Power*

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[9] Like the district court, we held that the availability of judicial review in the court of appeals made the process for determining "just compensation" constitutionally permissible. We went on to enumerate "at least five means at its disposal to gather the information needed to determine just compensation." *Gulf Power v. United States,* 187 F.3d 1324, 1334-35 (11th Cir.1999). A court of appeals could: (1) rely on the evidentiary submissions in the record of the FCC proceeding; (2) remand the case and direct the FCC to supplement the record pursuant to 28 U.S.C. § 2347(c); (3) transfer the case to a district court for full hearing pursuant to 28 U.S.C. § 2347(b)(3); (4) appoint a special master to hold hearings pursuant to Fed. R.App. P. 48; (5) or fashion any other "appropriate modes of procedure" to gather evidence it needs pursuant to the All Writs Act, 28 U.S.C. § 1651.

[10] Our holding on this point is somewhat confusing in that it seemingly held both that (a) the challengers failed to meet their burden of proof to show that in all situations the rate formula would inevitably be unconstitutional and (b) the takings claim was not ripe for review. This need not concern us here, and in any event there is an obvious affinity between the ripeness doctrine and the standard for facial challenges: both doctrines frequently require the challenger to bring a concrete, as-applied challenge.

II"). We held that (1) the FCC lacked jurisdiction to regulate pole attachments to the extent that the attaching cable operators also offered Internet service, (2) the 1996 Act authorized a taking as previously determined by *Gulf Power I*, and (3) the just compensation claim failed because the parties did not establish that there was no set of circumstances in which the FCC's rate regulation (like the general statutory rate scheme challenged in *Gulf Power I*) would be valid. The first holding was subsequently reversed by the Supreme Court in *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 122 S.Ct. 782, 151 L.Ed.2d 794 (2002).

Forced to bring a challenge in an as-applied context, APCo seized its opportunity in June 2000. APCo sent several letters to cable companies stating that it would terminate attachment agreements unless the cable companies agreed to higher rates.[11] Specifically, APCo demanded an annual rate of $38.81 per pole rather than the current $7.47. Various cable companies[12] sought relief by filing a complaint against APCo in the FCC's Cable Bureau, which ultimately found for the cable companies. The Bureau ordered APCo to reinstate the old $7.47 fee until a new agreement within the parameters of the Cable Rate could be reached. *Ala. Cable Telecommunications Ass'n v. Alabama Power Co.*, 15 FCC Rcd. 173,461 (2000). Meanwhile, a similar proceeding was initiated against Gulf Power by the Florida Cable Telecommunications

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[11] The pole attachment agreement between APCo and AT&T Cable Services was typical of the agreements worked out by cable and power companies. Section 31 of the agreement provided for an initial three year term (which had expired by the time APCo sought termination), followed by "continuation" unless either party provided the other with 90 days notice of cancellation.

[12] The initial complaint was filed by the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc.

Association and three cable Internet service providers, although that case languished in the Bureau and has yet to come to a resolution. Both APCo and Gulf Power filed petitions for review of the adjudication against APCo in this court, nos. 00-14763 and 00-15068, and they simultaneously sought review by the full Commission.

Since the initial filing of these petitions, two important decisions have been rendered. First is the Supreme Court's decision in *National Cable*. In that case, the Court reversed our first holding in *Gulf Power II* (regarding the FCC's jurisdiction) and thereby answered the jurisdictional arguments raised in this case. Thus, any contention that the FCC lacks jurisdiction to regulate the attachment rates of cable companies that also offer Internet services must fail. The second decision is the full Commission's Order affirming the Cable Bureau in the APCo proceeding. *See In the Matter of Alabama Cable Telecommunications Ass'n et al. v. Alabama Power Co.*, 16 FCC Rcd. 12,209 (2001). That decision rendered moot the FCC's argument that we ought not reach the merits of this case because the parties failed to exhaust their administrative remedies.[13] The Order also becomes the focus of any challenge under the Administrative Procedure Act, 15 U.S.C. § 706.[14]

In short, the as-applied context of this litigation, combined with the recent decisions of the FCC and Supreme Court, eliminate any threshold concerns that would otherwise preclude us from reaching the merits, such as ripeness, exhaustion (and hence the jurisdiction of this court), and the

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[13] That is, the Order eliminated any exhaustion problem that would have precluded us from reaching the merits at all. As we shall explain, however, the Order did not eliminate all exhaustion concerns.

[14] "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 15 U.S.C. § 706(2)(A).

jurisdiction of the FCC. Moreover, our decisions in *Gulf Power I* and *Gulf Power II* establish that the 1996 Act effects a taking, and our decision in *Gulf Power I* establishes that an initial determination of just compensation by the FCC is constitutionally permissible so long as there is judicial review in an Article III court.[15] The primary issue in this case, then, is a narrow one: whether the rate authorized by the FCC provides APCo with just compensation.

II.

A.

Before we address the merits, two threshold issues warrant our attention. First, the Communications Act of 1934 requires an application for review to the full Commission as a prerequisite to judicial review of decisions made under delegated authority. *See* 47 U.S.C. § 155(c)(7).[16] The mere act of filing an application alone does not satisfy the jurisdictional prerequisite. The petitioners must give the Commission an opportunity to issue a final decision; otherwise, the statutory prerequisite would be rendered useless. The rest of section 47 U.S.C. § 155(c)(7) confirms this common sense observation by mandating that the time

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[15] The petitioners renew their argument that regardless of the availability of judicial review, an administrative agency cannot determine just compensation in the first instance. "The law of this circuit," however, "is 'emphatic' that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision." *See Cargill v. Turpin,* 120 F.3d 1366, 1386 (11th Cir.1997).

[16] The statute states, "The filing of an application for review shall be a condition precedent to judicial review of any order, decision, report, or an action made or taken pursuant to a delegation under paragraph (1) of this subsection." "Paragraph (1)," referred to in the statutory text, empowers the Commission to delegate its functions to an "employee board or individual employee" and other entities. *See* 47 U.S.C. § 155(c)(1). This provision is the statutory basis for the Cable Bureau's authority to issue the first order in this case.

limit for filing a petition for review in the court of appeals must be computed "from the date upon which public notice is given of orders disposing of all applications for review filed in any case." *Id.* That is, the Commission must in some way act on the application for review before a party may petition a court of appeals for review. *See Richman Bros. Records Inc. v. FCC,* 124 F.3d 1302 (D.C.Cir.1997). In this case, both Gulf Power and APCo sought to bypass the full Commission by petitioning this court for review of the Cable Bureau's decision. Both petitions were therefore incurably premature—at least until the Commission finally reviewed APCo's petition. Accordingly, both of the initial petitions, nos. 00-14763 and 00-15068, are dismissed for failure to exhaust.

B.

The petition for review filed by Gulf Power is also defective because petitions for review may be filed only by parties to an agency proceeding. The Communications Act cross-references to the Hobbs Act, and so the latter governs the procedure for judicial review of FCC orders. *See* 47 U.S.C. § 402 ("Any proceeding to enjoin, set aside, annul, or suspend any order of the commission under this chapter . . . shall be brought as provided by and in the manner prescribed in [the Hobbs Act,] chapter 158 of Title 28."). That statute, in turn, provides that "[a]ny party aggrieved by the final order may . . . file a petition to review the order in the court of appeals where venue lies." 28 U.S.C. § 2344. A "party aggrieved" is one who participated in the agency proceeding. *See, e.g., Erie-Niagara Rail Steering Committee v. Surface Trans. Bd.,* 167 F.3d 111, 111-12 (2d Cir.1999); *See also In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 799 F.2d 317, 334 (7th Cir.1986) ("The statute limits review to petitions filed by parties, and that is that."). Another statute confirms this conclusion. Under 28 U.S.C. § 2348, only parties to the agency proceeding can intervene as of right,

while intervention by a nonparty is discretionary. This statutory condition would be defeated if the nonparty could file its own petition for review as a matter of right. Accordingly, Gulf Power's initial petition for review in this case, no. 00-15068, must also be dismissed for lack of standing. The Commission's final order does not affect this conclusion.[17] This leaves us only with APCo's petition for review of the Order by the full Commission, no. 01-13058-a petition joined by various intervenors but not Gulf Power.

III.

The petitioners contend that the statute and regulations fail to provide just compensation in this case. Their argument stems from three critical observations. First, the Cable Rate fails to allocate to the attaching cable companies a pro rata share of the unusable portion of the pole. The unusable portion—the part of the pole that is below ground or is otherwise unavailable for attachment—is a capital expenditure that benefits the cable companies no less than APCo.[18] The unusable portion constitutes a vast majority of the pole and provides ground clearance that creates the requisite elevated corridor that is necessary for all attach-ments. Therefore, the petitioners argue, such expenditures should be allocated to the attaching entities equally. Second, the petitioners argue that the Cable Rate inappropriately uses backwards-looking "historical" costs rather than fair market value or replacement cost. Since pole-related expenditures are largely a function of labor costs, the present "cost" of a network of poles is much greater than it was when the

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[17] Gulf Power is interested in the outcome of this case only because of its potential effect as a precedent for its own pending case. We note that Gulf Power has not moved to intervene. We will therefore treat it as *amicus curiae* in the APCo petition, no. 01-13058.

[18] The regulated rate that telecommunications companies must pay, by contrast, includes the unusable portion of the pole. *See* 47 U.S.C. § 224(3).

network was first erected. Third, the Cable Rate does not allow the recovery of various expenditures that are properly attributable to pole attachments. Once these costs are taken into account, together with an appropriate adjustment that allocates part of the unusable portion of the pole to cable companies and a further adjustment that utilizes fair market value or replacement (rather than historical) cost,[19] the "just" rate would be an annual rent of over $47 per pole. Because $47 is a "conservative" estimate, and since petitioners seek only $38.81 per pole, it is argued that the drastically less rate of $7.47 fails to provide just compensation.

We review constitutional challenges to agency orders *de novo*. *Gulf Power II*, 208 F.3d 1263, 1271; *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1313 (D.C.Cir.1988). At first blush, the power companies appear to have a solid argument. The FCC inappropriately focused on ratemaking cases such as *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). Cases like *Duquesne Light* stand for the proposition that rates can be regulated so long as they are not so "unjust" as to be confiscatory, and within this range the regulatory agency has broad discretion. *Id.* at 307, 109 S.Ct. at 616. When a physical taking is at issue, however, a different analytical hat must be worn. *See* 5 *Nichols on Eminent Domain* § 18.06[2], at 18-46 ("[T]raditional methods of valuation used in rate-making cases are not necessarily valid when eminent domain value is at issue."); *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 912 F.2d 1262, 1314 n. 52 & 1319 (11th Cir.1990), *vacated*, 499 U.S. 915, 111 S.Ct. 1300, 113 L.Ed.2d 235 (1991) (Tjoflat, C.J., dissenting) ("Because the company acts under compulsion . . . rather than voluntarily submitting to regulation as in the ratemaking cases, the court

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[19] In the proceeding before the Cable Bureau, expert witnesses were used to generate assessments of "value" based upon market value, income capitalization, and replacement cost methodologies.

should apply a more rigorous standard for just compensation than the relatively broad 'zone of reasonableness' standard developed under *Hope.*"). The Supreme Court made this analytical distinction clear in *FCC v. Florida Power Corp.,* 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), when the Court reversed this court for applying the traditional *Loretto* analysis rather than the "not confiscatory" standard. *Id.* at 253, 107 S.Ct. at 1113-14. As we have stated, this case *does,* in fact, trigger the *Loretto* analysis because of the element of compulsion in the 1996 Act.

In physical takings cases, the property owner generally must receive the "full monetary equivalent of the property taken." *United States v. Reynolds,* 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970). *See also United States v. Miller,* 317 U.S. 369, 373, 63 S.Ct. 276, 279, 87 L.Ed. 336 (1943) (just compensation requires "the full and perfect equivalent in money of the property taken."). The Supreme Court has remained steadfast in its resistance to a rigid rule for determining just compensation. *See, e.g., United States v. Commodities Trading Corp.,* 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950). Typically, fair market value is used. *Id.* Fair market value is established by determining "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *Miller,* 317 U.S. at 374, 63 S.Ct. at 280. There is not an active, unregulated market for the use of "elevated communications corridors," however, and so an alternative to fair market value must be used. *Cf. General Motors v. United States,* 140 F.2d 873, 875 (7th Cir.1944) (discussing use of replacement cost and income capitalization approaches). The appropriate alternative, whatever that may be, rarely countenances the use of historical cost, as several Supreme Court cases make clear. *See Commodities Trading Corp.,* 339 U.S. at 130, 70 S.Ct. at 553; *United States v. Toronto, Hamilton & Buffalo Navigation Co.,* 338 U.S. 396, 403, 70 S.Ct. 217, 221-22, 94 L.Ed. 195 (1949). Therefore, APCo argues that any of its substitute methods--the "sales

comparison" approach, the "replacement cost" approach, or the "income capitalization" approach—should be used. Any of these, it argues, yield a much higher rate than the FCC presently allows. When a constitutionally acceptable cost methodology is combined with a more appropriate inclusion of costs (such as unusable pole space and various capital expenditures), the "full monetary equivalent of the property taken" exceeds the $38.81 rate APCo seeks. While we might ordinarily be sympathetic to this argument,[20] APCo's case is complicated by one known fact, one unknown fact, and one legal principle.

The known fact is that the Cable Rate requires the attaching cable company to pay for any "make-ready" costs and all other marginal costs (such as maintenance costs and the opportunity cost of capital devoted to make- ready and maintenance costs), in addition to some portion of the fully embedded cost. *See In the Matter of Ala. Cable Telecomm. Ass'n et al. v. Ala. Power Co.*, 16 FCC Rcd. 12,209, ¶ 69 n. 154 (2001). Indeed, such costs were paid in the present case.[21]

The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is

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[20] Or maybe not. Arguably, this "as-applied" challenge flies in the face of our conclusion in *Gulf Power I* and *Gulf Power II* that the power companies failed to prove that there is no circumstance in which the rate would be constitutionally acceptable. That conclusion would seem to foreclose any argument based on the *methodology* of the formula--the crux of petitioners' argument in this case. The panel, however, may well have had in mind the general judicial aversion to facial challenges to rate orders, and it perhaps did not mean to preclude future challenges to the rate methodology in an as-applied context. *See Verizon Communications v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 1679-80, 152 L.Ed.2d 701 (2001) ("[T]he general rule is that any question about the constitutionality of ratesetting is raised by rates, not methods.").

[21] APCo received more than a million dollars in make-ready payments from cable company attachers.

taken. *United States v. Causby,* 328 U.S. 256, 261, 66 S.Ct. 1062, 1065-66, 90 L.Ed. 1206 (1946). Put differently, "[t]he question is, What has the owner lost? not, What has the taker gained?" *United States v. Virginia Elec. & Power Co.,* 365 U.S. 624, 635, 81 S.Ct. 784, 792, 5 L.Ed.2d 838 (1961) (citation omitted). This takings principle is a specific application of the general principle of the law of remedies: an aggrieved party should be put in as good a position as he was in before the wrong, but not better. *See generally* Dan B. Dobbs, *1 Law of Remedies 281* (1993). This legal principle, together with the fact that much more than marginal cost is paid under the Cable Rate, leads us to ask the following question: does marginal cost provide just compensation in this case?

This question exposes the unique nature of this case. Typically, the subject of a government condemnation proceeding is ordinary property, such as land. In such a case, the "value" of the thing taken is congruent with the loss to the owner, and there is therefore little tension between the legal propositions in *Virginia Electric* (loss to the owner, not gain to the taker) and *Reynolds* (full monetary equivalent of the property taken). This is because most property is rivalrous—its possession by one party results in a gain that precisely corresponds to the loss endured by the other party. In this case, however, the property that has been taken—space on a pole—may well lack this congruence. It may be, for practical purposes, *nonrivalrous.* This means that use by one entity does not necessarily diminish the use and enjoyment of others. A common example of a nonrivalrous good is national defense.

Suppose, for example, that a power company must, for its own "core" electric distribution activities, establish a network of poles that reaches one million feet into the sky. Further suppose that there is only one cable company in any one market that desires to attach to the power company's poles.

Finally, suppose that the government forces the power company to let the cable company attach to its pole network. What level of compensation is just? So long as the marginal cost of the attachment is paid, the power company incurs no lost opportunity or any other burden. That is, the cable company's use does not foreclose any other use. The pole space is, for practical purposes, nonrivalrous.

To this point APCo responds that the lost sale to the cable company—its opportunity cost—has also been taken. We think, however, that it is irrelevant whether the government keeps the condemned property for itself or appropriates it to another entity. That is, if the government ran its own monopoly cable company, it would not make sense for the power companies to say, "Even though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell to the government at what we deem the 'full market price' of this pole space." *Cf. United States v. Cors,* 337 U.S. 325, 333, 69 S.Ct. 1086, 1091, 93 L.Ed. 1392 (1949) ("The special value to the condemner as distinguished from others who may or may not possess the power to condemn has long been excluded as an element of market value."). It should not make a difference if the government chooses to allocate the condemned property to private companies.

In some cases, then, marginal cost will be sufficient to compensate the pole owner. A similar conclusion was reached in *Metropolitan Transp. Auth. v. ICC,* 792 F.2d 287 (2d Cir.1986). In that case, Amtrak was given the power to force its way onto the tracks of other railroad companies. The ICC had authority to decide the compensation Amtrak would pay, with the constraint that such compensation was to be limited to "incremental costs." The Second Circuit concluded:

> [A]ssuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but

> for the taking. In other words, the owner, there the lessee of the railroad facilities, will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation . . . . If the Fifth Amendment required such a sharing [of the overhead costs of ownership, then the petitioners] would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation, it is that the value to the taker is not to be considered, only loss to the owner is to be valued.[22]

Id. at 297.

Metropolitan Transportation involved something close to a nonrivalrous good. Allowing traffic from one railroad rarely means that another railroad is precluded from traveling on the same line unless, of course, the line is already crowded. The possibility of crowding is perhaps more likely in the context of pole space, however, and if crowded, the pole space becomes rivalrous. Indeed, Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime. 47 U.S.C. § 224(f)(2). When a pole is full and another entity wants to attach, the government taking forecloses an opportunity to sell space to another bidding firm—a missed opportunity that does not exist in the nonrivalrous scenario. By forcing the power company to rent space that could be occupied by another firm (or put to use by the power company itself), the analogy to land becomes more appropriate. In the "full capacity" situation, it is the zero-sum nature of pole space, like land, that is key. This leads us to the important unknown fact: nowhere in the record did APCo allege that APCo's network of poles is currently crowded. It

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[22] Notably, the court did not take the flawed analytical step of focusing on the track owner's lost opportunity to charge Amtrak "market" rates.

therefore had no claim. *See United States v. John J. Felin & Co.*, 334 U.S. 624, 641, 68 S.Ct. 1238, 1246, 92 L.Ed. 1614 (1948) (holding that the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking).

In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation. While this analysis may create what appears to be an anomaly—a power company whose poles are not "full" can charge only the regulated rate (so long as that rate is above marginal cost), but a power company whose poles are, in fact, full can seek just compensation--this result is in accordance with the economic reality that there is no "lost opportunity" foreclosed by the government unless the two factors are present.[23]

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[23] Since marginal cost provides just compensation so long as these factors are absent, it is irrelevant that the Telecom Rate provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments. The FCC reached a perfectly logical conclusion when it observed: Congress' decision to choose a slightly different rate methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula . . . because both formulas provide just compensation under the Fifth Amendment . . . . Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates. *In the Matter of Ala. Cable Telecomm. Ass'n,* 16 FCC Rcd. 12,209, ¶ 49.

IV.

A.

APCo contends that regardless of how we ultimately rule on the merits, the FCC's decision is "arbitrary and capricious" and therefore must be set aside under 5 U.S.C. § 706. The policy decisions of agencies must be set aside if they are not the product of reasoned decisionmaking. Courts are deferential to agency decisions and will not upset them merely because they disagree with the policy choice of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). In short, the court "must not . . . substitute [its] judgment for that of the agency . . . but rather determine whether there was a rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962).

We are unconvinced that the FCC's decision was arbitrary and capricious. APCo argues that the FCC's misguided references to *Duquesne Light* and other ratemaking cases, combined with its refusal to engage in detailed consideration of APCo's evidence on the just compensation issue, evinces unreasoned decisionmaking. The FCC did, however, note that reimbursement of marginal cost was tantamount to just compensation in this case. *See In the Matter of Ala. Cable Telecomm. Ass'n et al. v. Ala. Power Co.,* 16 FCC Rcd. 12,209 ¶ 52 (2001). Therefore, it was not obliged to engage in detailed analysis of expert testimony concerning the value proxies proffered by the petitioners' experts, which were irrelevant given the sufficiency of marginal cost. To be sure, the Cable Bureau and the full Commission might have been advised to inquire about the level of capacity presently on APCo's poles. But we can hardly fault the Commission for ignoring an issue that APCo never raised.

Finally, we note that APCo does not contend that the FCC decision was arbitrary and capricious in its policy determination; its concern is only with the FCC's constitutional analysis. Accordingly, we do not address the policy-based defenses raised by the FCC.[24]

B.

APCo asserts that the Commission's pole attachment complaint proceeding is defective because "if and when" they are ultimately successful in their claim that they are entitled to more than the statutory rate, "there may not be any process that will compensate APCo retroactively," because the FCC "apparently lacks the statutory authority to order a cable company to retroactively pay a charge higher than the statutory maximum." This argument posits a mere hypothetical. APCo has not demonstrated that in this case the Commission's procedures failed to provide it with adequate compensation, and so resolution of its claim must await another day. Moreover, this court explained in *Gulf Power I* that if a court were to find an FCC order to be insufficient, Section 224 permits the court to direct the FCC to issue a rate order providing that a utility receive the just compensation rate from the date it was first required to provide access under the mandatory access provision [and thereby] ensure a utility receives just compensation both prospectively and in the period prior to the court's determination of the just compensation rate. *Gulf Power I,* 187 F.3d at 1335.

C.

APCo also contends that the FCC's complaint process violated its Fifth Amendment due process rights because "pole complaints normally are to be adjudicated on the basis

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[24] We do not reach, for example, the question as to whether a hypothetical determination by the FCC to set the rate at marginal cost would be an "arbitrary and capricious" one, even if marginal cost would provide just compensation for Fifth Amendment purposes.

of the pleadings, without the opportunity for a hearing." Like the first procedural claim, this claim fails because it is based on a general observation rather than a real-life injury. The Commission's rules state that "[t]he Commission may decide each complaint upon the filings and information before it . . . or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings." 47 C.F.R. § 1.1411. APCo must therefore identify a material question of fact that warrants a hearing. But its dispute is only over the *methodology* that should be used to calculate the level of just compensation—a legal issue that hardly warrants an evidentiary hearing since no material facts are disputed. *See Mathews v. Eldridge,* 424 U.S. 319, 321, 96 S.Ct. 893, 896, 47 L.Ed.2d 18 (1976) (requiring that before a court concludes that there has been a due process violation, there must be a private interest affected). For example, if APCo and the cable companies were to later disagree about whether a pole network is operating at full capacity, the FCC may commit a due process violation if it were to adopt the cable companies' position without an evidentiary hearing. That day, however, has not yet arrived.

V.

It is well settled that if the government commits a taking, it is under an obligation to put the aggrieved party in the position it was in before the taking occurred (and no better). In unique cases such as this one, marginal cost meets this test—unless, of course, the aggrieved party proves lost opportunity by showing (1) full capacity and (2) a higher valued use. APCo never alleged these facts. Therefore, its challenges based on the Fifth Amendment and the Administrative Procedure Act must fail, and its petition for review is denied.

SO ORDERED.

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

Application for Review
File No. PA 00-003

In the Matter of ALABAMA CABLE TELECOMMUNICATIONS ASSOC., COMCAST CABLEVISION OF DOTHAN, INC., *et al.*,
Complainant,

v.

ALABAMA POWER COMPANY,
Respondent/Applicant.

FCC 01-181
Adopted: May 23, 2001
Released: May 25, 2001

ORDER

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

I. INTRODUCTION

1. Before the Commission is an application for review ("Application"), filed by Respondent on September 11, 2000, of an Order released by the Cable Services Bureau ("Bureau") under delegated authority.[1] The Order, DA 00-2078 ("Bureau Order"),[2] granted in part Complainant's pole

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[1] A listing of the documents filed in this matter and reviewed by the Commission is attached as an exhibit to this order.

[2] In the Matter of *Alabama Cable Telecommunications Assoc., et al. v. Alabama Power Company*, PA 00-003, DA 00-2078, 15 FCC Rcd 17346 (released September 8, 2000).

attachment complaint ("Complaint") filed pursuant to Section 224 of the Communications Act of 1934, as amended ("Pole Attachment Act")[3] and Subpart J of the Commission's Rules.[4] The Bureau Order found Respondent's proposed annual pole attachment rate of $38.81 to be unreasonable pursuant to the Pole Attachment Act and the Commission's rules. The Bureau Order required Respondent to allow the Complainant to continue to remain attached to Respondent's poles at the current annual negotiated rate of $7.47 per pole, pending the satisfactory negotiation of a new agreement. The parties were ordered to negotiate a new agreement in good faith using the Commission's cable pole attachment rate formula as a guide to establishing a reasonable rate. Respondent was also ordered to refund amounts charged over the $7.47 rate. Along with its Application, Respondent filed an emergency petition for stay of the Bureau Order pending judicial review ("Petition"). In this order we deny Respondent's Application and Petition.

II. BACKGROUND

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. The Commission shall provide that such rates, terms and conditions are just and reasonable.[5] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.[6] The

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[3] 47 U.S.C. § 224.

[4] 47 C.F.R. §§ 1.1401-1.1418.

[5] 47 U.S.C. § 224 (b) (1).

[6] 47 U.S.C. § 224(b)(1) and (2). Alabama has not certified that it regulates rates, terms and conditions of pole attachments. See Public Notice, "*States That Have Certified That They Regulate Pole Attachments*," DA 92-201, 7 FCC Rcd 1498 (1992).

Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[7] The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate.[8] The Telecommunications Act of 1996 ("1996 Act"),[9] expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers [10] in addition to cable systems,[11] until a separate methodology [12] became effective for telecommunications carriers after February 8, 2001.[13] Because the instant complaint concerns pole attachment rates in effect prior to February 8, 2001, we apply the cable attachment formula ("Cable Formula").[14] A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the Cable Formula. We have concluded that "where onerous terms or conditions are found

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[7] 47 U.S.C. § 224(b)(1).

[8] *See* Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979); Memorandum and Order, 77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987). *See also*, Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) and Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000)

[9] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] 47 U.S.C. § 153(44).

[11] 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

[12] *See* Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 at ¶¶ 116-130 (1998).

[13] *See* 47 U.S.C. § 224(d)(3) and 47 U.S.C. § 224(e)(4).

[14] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 5 (2000).

to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[15]

3. The Pole Attachment Act, as amended by the 1996 Act, imposes upon all utilities, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[16] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[17] The mandatory access provision added by the 1996 Act was addressed by the Eleventh Circuit Court of Appeals in *Gulf Power I*,[18] which held that the 1996 Act's mandatory access amendment to the Pole Attachment Act effected a taking of property, but that there is an adequate process for obtaining just compensation. In *Gulf Power II*,[19] the Court addressed the constitutionality of the Commission's regulations implementing the 1996 Act amendments and found that the regulations also authorize a taking of property. The Court

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[15] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

[16] 47 U.S.C. § 224 (f) (1).

[17] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 1123 (1996). *See also* Local Competition Reconsideration Order, In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration, FCC 99-266 (released October 26, 1999).

[18] *Gulf Power v. United States*, 187 F.3d 1324 (1999).

[19] *Gulf Power v. FCC*, 208 F.3d 1263 (2000), stayed pending Supreme Court review; petition for cert. granted January 22, 2001.

reserved on the issue of whether the regulations provide just compensation under the Fifth Amendment to the Constitution, stating that the issue was not ripe for review.[20]

4. Subpart J of the Commission's rules[21] sets out a scheme for an aggrieved party to seek recourse to the Commission after negotiations with a utility have failed. In addition to other requirements, a pole attachment complaint must state with specificity the pole attachment rate that is claimed to be unjust or unreasonable.[22] A complaint must include specific information supporting the complainant's allegation that the pole attachment rate is unreasonable but will not be dismissed if the utility has failed to provide the information.[23] If it has not already done so, a utility shall provide the required information in response to the complaint.[24] This information includes all of the supporting information necessary to a calculation of the maximum pole attachment rate allowed under the Pole Attachment Act, using the Cable Formula, and the supporting pages from the utility's Federal Energy Regulatory Commission ("FERC") Form 1.[25]

III. BUREAU ACTION

5. The Bureau Order concluded that the parties to the Complaint were engaged in an approximately 20 year relationship, during which time Complainant's attachments to Respondent's poles were governed by agreements which provided for Complainant to pay an annual pole attachment fee

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[20] *Id.* at 1272-73.

[21] 47 C.F.R. §§ 1.1401-1.1418.

[22] 47 C.F.R. § 1.1404 (e).

[23] 47 C.F.R. § 1.1404 (k).

[24] *Id.*

[25] *Id. See also* 18 C.F.R. Part 101 for a list and description of the FERC accounts.

to Respondent. For a number of years prior to the Complaint, the parties' used the Commission's Cable Formula as the basis for negotiating this rate. For the year beginning July 1999 through June 2000, Complainant was charged an annual pole attachment rate of $7.47 per pole. Complainant did not challenge that rate. In June of 2000, Respondent announced that it was rescinding all existing agreements and requested Complainant to enter into new agreements with an annual rate of $38.81 instead of $7.47. Complainant responded by filing this Complaint. In order to calculate a reasonable pole attachment rate when the parties to a pole attachment agreement cannot negotiate a reasonable rate, the Commission applies the Cable Formula using public data when available. In this case, both parties submitted pole attachment rate calculations that drew similar conclusions, but neither calculation resulted in an increase above the last rate agreed to by the parties, $7.47.

6. The Bureau Order also concluded that Respondent did not attempt to justify its proposed $38.81 rate using the Cable Formula. Instead, the Respondent argued that the Complaint should be dismissed for lack of jurisdiction and second, that the Cable Formula does not provide just compensation and the Bureau should substitute a different methodology for determining the maximum permitted rate. The Bureau denied Respondent's motion to dismiss and Respondent's arguments in favor of a different methodology. The Bureau Order concluded that the Cable Formula has provided a stable and certain regulatory framework, that may be applied simply and expeditiously requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." [26]

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[26] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. at 21 (1977) (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

Indeed, the Bureau Order noted that Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, in this case, to the Federal Energy Regulatory Commission.[27] The Bureau Order further noted that the United States Supreme Court has upheld the Cable Formula for calculating pole attachment rates.[28]

7. The Bureau Order concluded that the Commission's rules governing pole attachment rates are directly derived from the Pole Attachment Act and that a utility is compensated in full for any make-ready or change-out costs associated with the attachment.[29] The Bureau Order further concluded that the Cable Formula used to calculate an annual pole attachment rate allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on investment and provides just compensation to the utility for the space occupied on the pole.

IV. APPLICATION FOR REVIEW

A. Jurisdiction over attachments that provide high-speed access to the Internet

1. Respondent's position

8. Respondent argues first that the entire proceeding should be dismissed because the Complainant provides Internet services and therefore the Commission does not have jurisdiction over the charges for their pole attachments

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[27] *Id.*

[28] *FCC v. Florida Power Corporation*, 480 U.S. 245 (1987).

[29] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole "change-out" is the replacement of a pole to accommodate additional users.

pursuant to *Gulf Power II*. Respondent alleges that the Bureau ignored the *Gulf Power II* decision because no mandate was issued in that proceeding. Respondent argues that this action is inexplicable and unlawful because the Eleventh Circuit rules state that the "issuance or non-issuance of the mandate" has no impact on the binding nature of a published decision, citing the Eleventh Circuit Internal Operating Procedures associated with *Federal Rule of Appellate Procedure 36* and the cases cited therein. Respondent argues that a stay of the mandate is irrelevant. Respondent claims that the Bureau's decision is made more egregious due to the fact that the Commission and Respondent were both parties to the *Gulf Power II* decision.

2. Complainant's position

9. Complainant responds that the Bureau was correct in finding that the decision in *Gulf Power II*, regarding the Pole Attachment Act's application to cable attachments that are commingled with Internet services, was not final and did not require dismissal of the Complaint. Complainant argues that, as the Bureau pointed out, further litigation is in progress over that question. Complainant further points out that the Courts in both *Gulf Power I* and *Gulf Power II*, found the Commission's jurisdiction to preserve physical access to poles to be constitutional, both before the 1996 Act, for voluntarily negotiated attachments and after the 1996 Act, for attachments made pursuant to the mandatory access requirements of the Pole Attachment Act.[30] Complainant also argues that its current pole attachment arrangements are the product of negotiated access conducted prior to 1996 and the Commission has continuing jurisdiction to require Respondent to maintain reasonable rates, terms and conditions with respect to pole attachments entered into before the 1996 Act. Complainant asserts that Respondent's argument to the contrary is

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[30] Citing *Gulf Power I* at 1333-1336.

inconsistent with both the Supreme Court's decision in *FCC v. Florida Power Corp.*[31] ("*Florida Power*") and with *Gulf Power I* and *II*.

10. Complainant continues that Respondent's attempts to jettison the Commission's jurisdiction over cable pole attachments and exact monopoly rents is premature because the *Gulf Power II* decision, even assuming it were correct, is not yet final. Complainant argues that the decision has been stayed since its inception, first due to the pending petitions for rehearing and/or rehearing en banc and subsequently through a stay pending the filing of a petition for certiorari with the United States Supreme Court.[32] Complainant also argues that Respondent's case appears premised on its claim that the potential to provide Internet divests the FCC from any authority over all of these attachments. Complainant responds that a well-built cable system has the potential for carrying communications services yet unborn but that potential does not remove it from the scope of the Pole Attachment Act. Finally, Complainant argues that, even if *Gulf Power II* were final and correct, Respondent has made no showing that "Internet" will be provided over every Alabama attachment to every customer.

3. Discussion

11. We find that the Bureau did not ignore the *Gulf Power II* decision but instead made a reasoned decision not to dismiss the Complaint because the *Gulf Power II* mandate was stayed by the Court. The cases cited in the Eleventh Circuit Internal Operating Procedures and by Respondent are not applicable to the instant case. *Martin v. Singletary*,[33]

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[31] 480 U.S. 245 (1987).

[32] Because that petition was granted on January 22, 2001, the stay is effective until the case is decided by the Supreme Court.

[33] 965 F.2d 944 (11th Cir. 1992).

involved a convicted murderer's third petition for federal habeas relief. In rejecting the petition for relief, the court found that petitioner failed to meet a test of "actual innocence" established by a previous court decision. Although that previous decision was stayed, the court applied the same test of "actual innocence." The Court elucidated however, that "[a] mandate is the official means of communicating our judgment to the district court and of returning jurisdiction in a case to the district court. The stay of the mandate in [the previous court decision] merely delays the return of jurisdiction to the district court to carry out our judgment in that case." [34] Similarly, in *Vo Van Chau v. Department of State*,[35] cited by Respondents, the question arose in the context of a motion for preliminary injunction. In evaluating whether a party was likely to succeed on the merits of its case, the court looked to a previous decision for guidance. Even though the mandate for that previous decision had not issued, the court was guided by that decision in its determination of the likelihood of success of the case before it.

12. The instant case is quite distinguishable from those two examples. As Respondent points out, the Commission is a party to the *Gulf Power II* decision. The Commission requested and was granted a stay pending review by the Supreme Court. In requesting a stay, the Commission pointed out that an immediate issuance of the mandate would cause premature and perhaps unnecessary disruption in major segments of the cable industry, and it could threaten the deployment of affordable high-speed Internet access for many American consumers. In contrast, the Commission explained, maintaining the longstanding status quo for several additional months would not cause substantial harm to the parties. The request for a stay was granted and the result is to preserve the

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[34] *Id.* at 945, n.1.

[35] 891 F. Supp. 650 (D.D.C. 1995).

regulatory status quo. In fact, that is the very purpose of the stay, to preserve the status quo pending final action by the Supreme Court.[36] The Respondent is the party seeking to upset the status quo by raising its pole attachment rates and ignoring the Commission's regulations for calculating reasonable rates. The Bureau merely applied the Commission's rules which, in conformance with the Eleventh Circuit's grant of a stay of the mandate in *Gulf Power II*, remain in effect pending Supreme Court review, and which preserve the same standard that has been applied for over twenty years and was approved by the Supreme Court in Florida Power. We will affirm the Bureau's decision not to dismiss the Complaint for lack of jurisdiction based on *Gulf Power II*.[37]

B. Jurisdiction over the rates, terms and conditions of mandatory nondiscriminatory access

1. Respondent's position

13. Respondent argues that the proceedings should be dismissed because the circumstances surrounding Respondent's termination of the pole attachment agreements with Complainant and the rate increase involve only a breach of contract claim and the Commission does not have jurisdiction over such claims. Respondent argues that the Bureau Order nullifies Respondent's contractual right to terminate its existing agreements. Respondent believes that the Bureau

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[36] *Commodity Futures Trading Commission, et al. v. British American Commodity Options Corp., et al.*, 434 U.S. 1316, 1319, 98 S.Ct. 10, 12 (1977). *See also, Algonquin Gas Transmission Co. v. Township of Bernards in Somerset County*, 112 F.Supp. 86, 91 (1953) ("The effect of stay of mandate by the United States Court of Appeals is to continue the status quo for period specified in stay.")

[37] We note that the regulatory status of cable Internet access is the subject of an ongoing Notice of Inquiry, Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities, FCC 00-355 (released September 28, 2000).

accepted an argument made by the Complainant that a "course of dealing" had superseded the parties' mutual right to terminate the contracts. Respondent cites Commission decisions that delineate the Commission's jurisdiction. For example, Respondent quotes *Marcus Cable Associates v. Texas Utilities* [38] ("Marcus Cable"), where the Commission held that its authority over pole attachments does not "supplant that of the local jurisdiction when the issue between the parties is a breach of contract not involving unjust or unreasonable contractual rates, terms, or conditions. Consequently, the threshold question before us is whether the issues raised in the Complaint concern a breach of contract not involving unjust and unreasonable contractual rates, terms and conditions." [39] Respondent concludes that this precedent establishes that the instant proceeding should be dismissed.

2. Complainant's position

14. Complainant answers that Respondent's sudden termination of Complainant's pole attachment contracts and its attempt to unilaterally impose a new contract with an annual attachment rate of $38.81 per pole, more than 500 percent higher than existing pole attachment rates, violated the Commission's rules requiring negotiation in good faith, and prevention of unjust and unreasonable pole attachment rates, terms and conditions. Complainant argues that, despite Respondent's attempts to depict this dispute as one involving only the enforcement of legitimate contract rights, Respondent departed from a long established course of dealing over pole attachment amendments in order to apply a termination clause as a coercive mechanism for demanding that Complainant sign a new, one-sided pole agreement with a more than 500 percent rate increase. Complainant claims that

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[38] In the *Matter of Marcus Cable Associates, LP v. Texas Utilities Electric Co.*, 12 FCC Rcd 10362 (1997).

[39] *Id.* at ¶ 10 (footnote omitted).

Respondent's implied threat to interrupt Complainant's business should Complainant fail to acquiesce to Respondent's unilateral demands, and Respondent's unwillingness to negotiate at all were violations of the Commission's established requirement that utilities must negotiate all pole attachment agreements in good faith. Complainant states that in the past two decades, when one party, usually the utility, has given notice of an intent to terminate, despite contractual language purporting to require the removal of Complainant's cables and wires from the utility's poles, the parties have agreed that Complainant's facilities may remain on the poles during the conduct of good faith negotiations towards a new pole agreement.

15. Complainant also argues that Respondent's termination of Complainant's pole attachment contracts would cause irreparable harm. Complainant asserts that if unilaterally imposed contracts are not accepted, the termination of existing contracts would remove the provisions which currently govern all of the day-to-day matters involving pole attachments, including matters relating to construction, modification, rights-of-way, transfers, inspections, damage and indemnification, safety, and other technical and engineering issues, imposing enormous uncertainty and substantial technical and financial risks upon Complainant during their conduct of daily operations, including installations, repairs, upgrades, and rebuilds. Complainant states that it cannot reasonably reproduce a substitute facility for Respondent's poles or move facilities underground.

16. Complainant continues that payment of the $38.81 rate pending final resolution would substantially limit its ability to offer new services such as digital cable service, expanded video service, and advanced telecommunications service. Complainant asserts that most smaller operators do not have the capital resources to cover such a large increase in operating expenses, and it is uncertain whether the necessary

funds could be obtained from lenders. Complainant also argues that cable operators would not be likely to recover the increase in pole rents through subscriber charges because of competitive market conditions, including competition from DBS dishes that Respondent sells. Complainant also asserts that the magnitude of Respondent's pole rate increase is likely to lead some small cable operators to go out of business and prevent, delay or make economically infeasible Complainant's rebuilds and other services to the public and public entities, including schools, libraries, and government facilities.

17. Complainant concludes that the Commission has jurisdiction over these matters and the authority to remedy abuses. Complainant also cites Marcus Cable for the proposition that "the Commission's jurisdiction encompasses certain practices growing out of a contractual relationship between a utility and a cable operator . . .".[40] Complainant cites additional cases supporting the Commission's jurisdiction over all complaints involving the rates, terms and conditions of pole attachments.[41] Finally, Complainant asserts that the law is clear that Respondent may not create new rents or contract terms by unilateral amendment to existing contractual arrangements and then immunize its actions from Commission scrutiny.[42] Complainant also compares Respondent's

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[40] *Id.* at 10366.

[41] Complainant cites the following cases: *Mile Hi Cable Partners, L.P. v. Public Service Company of Colorado*, 14 FCC Rcd 3244 (1999); *Public Service Co. of Colorado v. Mile Hi Cable Partners L.P.*, No. 98CA1666, 1999 Colo. App. LEXIS 334 (Ct. App. Dec. 23, 1999); and *Texas Utilities Electric Co. v. Heritage Communications, Inc.*, CA 3-89-3080-R (N.D. Tex. June 22, 1990).

[42] In support if its assertion, Complainant cites Second Report & Order in Docket 78-144, 72 F.C.C.2d 59, 67 (1979), *aff'd, Monongahela Power Company v. FCC*, 655 F.2d 1254 (1981); *Capital Cities Cable, Inc. v. Southwestern Public Service Co.* PA-85-0005, Mimeo No. 5431 (June 28, 1985), *recon. denied*, PA-85-0005, Mimeo No. 6957 (September 13,

duty to negotiate in good faith under the Pole Attachment Act and the Commission's rules,[43] with broadcast stations' obligation to negotiate retransmission consent agreements in good faith under the Satellite Home Viewer Improvement Act of 1999,[44] concluding that the Bureau Order properly imposed a bargaining order on Respondent pursuant to its statutory authority to ensure that the rates, terms and conditions of attachments remain just and reasonable.

3. Discussion

18. As noted above, pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility to insure that such rates, terms and conditions are just and reasonable.[45] Where onerous terms or conditions are found to exist, we may adjust rates or invalidate the term or condition.[46]

1985); *TCA Management Co. v. Southwestern Public Service Company*, 10 FCC Rcd. 11832 (1995) at ¶¶ 14-15 (citing *Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1257 (D.C. Cir. 1981) (*per curiam*); *Capital Cities v. SPS, supra*, slip. op. at 2, ¶ 4; *Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corp.*, PA 84-0016, Mimeo 35810, slip. op. at 2, ¶ 4 (released May 17, 1985); *TeleCable Development Corp. v. Appalachian Power Co.*, PA 79-0007, Mimeo 889, slip. op. at 3 (Com. Car. Bur. released Oct. 31, 1980).

[43] Citing Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd. 468 (1989) at ¶ 39; Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Report and Order, 2 FCC Rcd. 4387 at n.51 (1987).

[44] Citing Implementation of the Satellite Home Viewer Improvement Act of 1999, 15 FCC Rcd 5445 at 40-43 (released March 16, 2000).

[45] 47 U.S.C. § 224(b)(1).

[46] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

Frequently, respondents to complaints will argue that the complaint is not really about the rates, terms and conditions of access but instead is merely a matter of breach of contract more suitable for another forum. Although certain remedies for breach of contract may be pursued in forums other than the Commission, the Commission has primary jurisdiction over issues about the reasonableness of rates, terms and conditions concerning pole attachments.[47]

19. We would be hard pressed to find a set of circumstances that falls more within the Commission's jurisdiction than the circumstances of this case. In this matter, the issue is not whether the Complainant failed to pay its invoice, or rearranged attachments in violation of an agreement negotiated in conformance with the Commission's rules and the Pole Attachment Act, but whether Respondent's unilateral rate increases, with the concomitant threat to dislodge Complainant's attachments with the express purpose to make Complainant assert its mandatory right to access,[48] constitute unjust and unreasonable rates, terms or conditions. Every allegation contained in the complaint involves the rates, terms and conditions of access to Respondent's poles. The Bureau's decision, to order Respondent to allow the Complainant to continue to remain attached to the poles pending the negotiation of a rate in accordance with the Commission's formula, is well within the Commission's jurisdiction to enforce the access provisions of the Pole Attachment Act as well as the Commission's jurisdiction to ensure that conditions of pole attachment agreements are just and reasonable.

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[47] *See*, for example, In the Matter of *Mile Hi Cable Partners, et al. v. Public Service Company of Colorado*, 14 FCC *Rcd* 3244 (1999) at ¶ 12.

[48] Respondent's June 8, 2000 letters to Complainant state that "If Attachee should desire to keep its facilities on APCO's poles, then Attachee must exercise its right of mandatory access."

20. The Bureau also concluded that, under these circumstances, an attacher that is already attached to a utility's poles is not required to file a complaint for access under the Commission's rules in order to remain on the pole pursuant to the mandatory access provisions of the Pole Attachment Act.[49] This is because there are no preliminary access issues, such as insufficient capacity or safety considerations,[50] to be determined if an attacher is already on the pole. Requiring an attacher to utilize the complaint process to gain mandatory access when it is already attached to the pole would be an inefficient waste of the parties' and the Commission's resources. However, the larger issue is whether all voluntary relationships become mandatory pursuant to the 1996 Act's mandatory access amendments to the Pole Attachment Act. While the mandatory access provisions of the Pole Attachment Act could arguably be construed as directed to new entrants attempting to gain access to crowded poles, the language of the Pole Attachment Act does not draw a distinction between old and new attachers. This issue is only relevant if the *Gulf Power I* and *Gulf Power II* decisions, which held that the mandatory access provisions of the Pole Attachment Act and the Commission's regulations implementing the Pole Attachment Act authorize a taking, are found to impose a different standard of compensation for mandatory as opposed to voluntary relationships.

21. Because a pole owner generally may, at some point, pursuant to a negotiated agreement, terminate its voluntary relationship with an attacher under reasonable terms and conditions, we cannot support a finding that voluntary relationships are "grandfathered" under the Pole Attachment Act as

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[49] The pertinent provision of the Pole Attachment Act states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of- way owned or controlled by it." 224 U.S.C. § 224(f)(1).

[50] *See* 224 U.S.C. § 224(f)(2).

perpetual voluntary relationships. We believe that any constitutional challenge to the Commission's rate formula will be analyzed by a court pursuant to *Gulf Power I* and *Gulf Power II* as if the attachment at issue was mandatory under the Pole Attachment Act, whether or not the attacher enjoyed an existing voluntary relationship at the time of the 1996 Act amendments to the Pole Attachment Act. However, as more fully explained below, the Pole Attachment Act and the Commission's rules implementing the Pole Attachment Act, including the Commission's formula for calculating just and reasonable pole attachment rates, satisfy the constitutional requirement of just compensation for the taking of property under the Fifth Amendment to the U.S. Constitution, whether or not the relationship between attacher and utility is voluntary or mandatory.

C. The requirement of due process and request for stay

1. Respondent's position

22. Respondent argues that the Bureau Order effects an unconstitutional taking because the Commission does not provide a reasonable, certain, and adequate process for obtaining just compensation. Respondent claims that in *Gulf Power I*, the Commission committed to the Eleventh Circuit that it would stay any of its orders that would lower a pole attachment charge below that which the pole owner deems to be just compensation until that order is reviewed by a court. Respondent asserts that this policy would allow a utility to have judicial review of the Commission's determination of just compensation prior to being forced to provide access to its property. Respondent argues that such a commitment is necessary to ensure that a reasonable, certain, and adequate provision for obtaining just compensation exists at the time of the taking. Respondent claims that the Commission is now acting in contravention of this express policy.

23. Respondent argues that the holding in *Gulf Power I*, that judicial review of any Commission rate determination would "ensure that the utility is not required to provide access to its property at a rate that does not provide just compensation," [51] is premised on the understanding that Respondent would not be required to provide access to its facilities for a fee less than what Respondent deemed to be just compensation until a judicial determination of just compensation was made. Respondent supports its argument with the claim that in answer to a question posed by the Court in *Gulf Power I*, "[d]oes 47 U.S.C. section 224, or any regulation issued pursuant to that provision, require a utility to provide access to its poles, ducts, conduits, or rights-of-way at a rate below which the utility considers to be just compensation at any time prior to a court determining the just compensation for that access?",[52] the Commission (through the Department of Justice) replied that a pole owner would not be required to provide access at a rate below what the owner considers to be just compensation until judicial review is made because the Commission would stay the operation of any of its orders that might attempt to reduce that charge. Respondent claims that the *Gulf Power I* decision was predicated upon these representations made by the Commission. Respondent relies on this same argument in support of its petition for emergency stay.

24. Respondent claims that it is time for the respective parties to pole attachment agreements to end the complaint process before the Commission and have the courts review the just compensation requirements arising from the taking effectuated by the mandatory access provision. In order to accomplish this and allow the judicial process to work,

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[51] Citing *Gulf Power Co. et al. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999).

[52] *See* letter dated March 29, 1999 to Clerk, United States Court of Appeals for the Eleventh Circuit from the U.S. Department of Justice.

Respondent argues that the Commission should stay the effects of the Bureau Order pending judicial review. Respondent also claims that fundamental principles of fairness and equity require the Commission to stay the Bureau Order to avoid making inconsistent and prejudicial representations to the courts.[53]

2. Complainant's position

25. Complainant responds that both of Respondent's contentions, first, that under *Gulf Power I* no party may have access to its utility poles prior to judicial review of its claim for compensation and second, that the Commission is obligated to stay the Bureau Order pending judicial review, are incorrect. Complainant argues that *Gulf Power I* specifically rejected the notion that Respondent may charge whatever fee it wishes prior to a judicial determination of just compensation,[54] holding instead that "[t]he Fifth Amendment does not require a judicial determination of just compensation in the first instance on each occasion of a taking of private property."[55] Complainant quotes the *Gulf Power I* decision as follows:

> [W]e see no constitutional problem with a process that employs an administrative body, such as the FCC, to determine just compensation in the first instance. Indeed, use of an administrative body with some technical expertise over the subject matter of the property to be valued likely will aid the judiciary in arriving at a more reliable determination of the proper level of just compensation. So long as an administrative body's decision

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[53] Citing *Chandler v. Samford University*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999); *Morrow v. City of Birmingham*, 926 F. Supp. 1033, 1040-42 (S.D. Ala. 1996), *aff'd*, 117 F.3d 508 (11th Cir. 1997) and *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995).

[54] Citing *Gulf Power Co. v. FCC*, 187 F.3d 1324, 1334 (11th cir. 1999).

[55] Citing *Id.* at 1334.

concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of 'provid[ing] an adequate process for obtaining compensation.'[56]

26. Complainant continues that if a court reviewing a rate decision by the Commission concludes that the rate does not provide just compensation, it may issue a new rate order which ensures that just compensation is provided from the commencement of any attachment. Complainant also asserts that Respondent's claim concerning the Commission's alleged representation to the *Gulf Power I* court is erroneous. Complainant states that no such promise was made, rather the response to the Court's question merely stated that the Commission has the power to stay its rate order pending review by a court of appeals. Complainant points out that neither the Department of Justice nor the Commission ever promised to always grant such a stay and the Commission did not bind itself to a blanket policy requiring a stay of any rate order simply because the utility disagreed with the result.

27. Complainant also points out that in this case, a stay of the Bureau Order requiring the parties to negotiate an agreement in good faith would effect a drastic change in the status quo and irreparable harm. Complainant argues that committing itself to such an inflexible policy of staying every decision would rob the Commission of any effective legal authority to fulfill its statutory duties under the Pole Attachment Act. Complainant concludes that because the Commission never made the unlikely promise that Respondent claims, to stay its own rate orders pending judicial appeal, the refusal to grant the stay requested by Respondent is neither contrary to express Commission policy nor void due to estoppel.[57]

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[56] Citing *Id.* at 1333.

[57] Complainant also notes that the Respondent's argument that the cable industry also "committed" to the Eleventh Circuit to pay whatever a

3. Discussion

28. The Fifth Amendment to the United States Constitution states in pertinent part that "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[58] The 1996 Act amendments to the Pole Attachment Act gave cable operators and telecommunications carriers a mandatory right of nondiscriminatory access to utility poles, ducts, conduit and rights-of-way.[59] In *Gulf Power I*, the Court analyzed the constitutionality of this right of access in light of the Fifth Amendment's prohibition against the taking of property for public use without due process and just compensation. After disposing of the issue of whether the mandatory access provision effects a taking of property and finding that it did, the *Gulf Power I* Court reviewed whether an adequate process is available to a utility to secure just compensation for that taking. The Court concluded that there is an adequate process. First, the Court stated that a reasonable, certain and adequate provision for obtaining compensation must exist at the time of the taking.[60] Then the Court determined that, although it is ultimately the responsibility of the judicial branch to ensure that the constitutional standard of just compensation is satisfied,[61] there is

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utility asked pending judicial review is inaccurate, citing an April 5, 1999 letter by counsel for the National Cable Television Association to Thomas Kahn, Clerk of the Eleventh Circuit ("If the FCC orders a reduction in rates, utilities may likewise seek a stay of the rate order from either the FCC or the Court of Appeals") (emphasis added by Complainant).

[58] U.S. Const. Amend. V.

[59] 47 U.S.C. § 224(a),(f).

[60] *Gulf Power I* at 1331.

[61] *Id.* at 1333

no constitutional problem with a process that employs an administrative body, such as the Commission, to determine just compensation in the first instance.[62]

29. The *Gulf Power I* Court next reviewed the existing process for judicial review of Commission orders to determine if that judicial review process ensures that the final and conclusive determination of the just compensation owed to a utility is made by the judicial branch.[63] *Gulf Power I* concluded that because the judicial review process could ensure that a utility would receive a just compensation rate both prospectively and in the period prior to the court's determination of the issue, the process is constitutionally adequate.[64] Although no party to the *Gulf Power I* decision appealed the Court's determination on this issue, various parties, including Respondent, continue to argue that the process is inadequate. Our review of the letters provided in response to the Court's question, stated above in paragraph 23, reveal that neither the Commission, nor the Department of Justice representing the Commission, indicated that the Commission would stay all pole attachment compensation orders pending judicial review. The letters merely provide a summary of the existing process, which allows either the Commission or a court to stay a compensation order pending further review. Indeed, had the *Gulf Power I* Court relied on any such representations in reaching its conclusions, it would have included those representations in its reasoning supporting its decision. Instead, the *Gulf Power I* decision reiterates the process as it exists and as it was referred to in

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[62] *Id.* at 1333.

[63] *Id.* at 1334.

[64] *Id.* at 1335 ("Directing the FCC to issue a rate order providing that a utility receive the just compensation rate from the date it was first required to provide access under the mandatory access provision will ensure a utility receives just compensation both prospectively and in the period prior to the court's determination of the just compensation rate.")

the referenced letters.[65] As the *Gulf Power I* court concluded, the Commission's rules provide an adequate process for a pole owner to secure just compensation under the constitutional standard as elucidated in *Gulf Power I*. We find that denial of Respondent's request for a stay is not inconsistent with the representations made by the Commission and the Department of Justice to the Eleventh Circuit Court of Appeals in *Gulf Power I*. We therefore reject Respondent's argument that the Commission is estopped from reviewing any requests for stay on the merits of the request.

30. Furthermore, Respondent's argument that every compensation order should be automatically stayed without regard to the merits of such action is unpersuasive. Respondent's proposal would allow Respondent to charge any rate with impunity, completely nullifying the Pole Attachment Act, whose purpose is to prevent the charging of monopoly rents by utilities for pole attachments. Respondent could charge monopoly rents, eliminate competition to Respondent's own services, and create not only a monopoly over poles but over services as well.

31. We are also not persuaded by Respondent's arguments for a stay of this Bureau Order. To be successful on a request for stay of the effectiveness of a bureau or Commission order pending judicial review, Respondent must demonstrate that (1) it has a substantial likelihood of succeeding on the merits; (2) it would suffer irreparable harm absent relief; (3) a grant would not substantially harm others; (4) the relief requested would be in the public interest.[66] Other than arguing, as noted

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[65] *Id.* at 1334-1336.

[66] *See Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (DC Cir. 1977); *In the Matter of Applications of Cumulus Licensing Corp.*, Order, FCC 00-391 (released Jan. 17, 2001), *In the Matter of Applications of Shareholders of CBS Corp. and Viacom, Inc. for Transfer of Control of CBS Corp. and Certain Subsidiaries*, Order, FCC 01-94 (released March 16, 2001).

above, that the Commission made representations to the *Gulf Power I* court, Respondent did not attempt to support its emergency petition for stay. By not staying the Bureau Order, we are preserving the status quo and avoiding the disruption to the Complainant's cable operations pending this further review by the Commission and the appeals court. As the *Gulf Power I* Court concluded, "it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum." [67] We conclude that Respondent has not presented evidence that would support a stay of the Bureau Order pending Commission or judicial review.[68]

D. The requirement of just compensation

1. Respondent's position

32. In addition to its process arguments, Respondent argues that the Order fails to provide just compensation because, according to Respondent, the Commission's formula does not provide the "full and perfect equivalent in money of the property taken."[69] Respondent lists three reasons why the formula is constitutionally deficient in Respondent's view. First, Respondent claims that the formula does not require cable companies to pay their fair share of the costs of unusable space; second, Respondent claims that the formula does not allow for a recovery from all of the FERC accounts containing pole-related costs; and third, the formula uses embedded costs in its calculations. Respondent disputes that the formula provides compensation for the fully allocated costs of a pole and argues that the $38.81 fee is a conservative measure of just compensation. Respondent argues that

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[67] *Gulf Power I* at 1338.

[68] We note that Respondent presented a more thorough argument in its petition for stay filed with the 11th Circuit Court of Appeals in Case No. 00-147631. However, Respondent's petition for stay was denied by the 11th circuit Court of Appeals on Jan. 3, 2001.

[69] Citing *United States v. Miller*, 317 U.S. 369, 373 (1942).

judicial precedent indicates that in instances where market value is not readily apparent, there are various other measure of value that are employed to ensure that compensation meets the constitutional standard.[70] Respondent argues that it submitted voluminous materials establishing that the $38.81 charge is consistent with principles of just compensation and that the Commission's formula fails to provide just compensation.

33. In support of its argument that the formula does not require cable companies to pay their fair share of the costs of unusable space, Respondent cites to the legislative history of the 1996 Act amendments to the Pole Attachment Act. Respondent argues that, in establishing a rate for telecommunications attachers as opposed to cable attachers, Congress expressed a view that the unusable space on a pole "is of equal benefit to all entities attaching to the pole."[71] Respondent continues that the formula's use of embedded costs does not provide just compensation. Respondent asserts that using embedded or historical costs is disfavored as a measure of current market value.[72] Respondent continues that the cost of materials, labor, easements, and placement is greater today than it was at the time the system was constructed and the market value of the pole system is far greater than the historical cost of the system. Respondent argues that demand for the utility corridors has increased and the value of the linear corridors in the modern technological era is not related to the original cost of a single pole. Respondent also argues that forward-looking, or replacement, cost is the measure used to determine the prices new entrants into the telecommunications market must pay to incumbents to

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[70] Citing *United States v. Toronto, Hamiliton, & Buffalo Navigation Co.*, 338 U.S. 396, 403 (1949).

[71] Citing House Report No. 104-204, at 92; House Conf. Rep. No. 104-458, at 206.

[72] Citing *Id.* and 8A Nichols § 20.01.

purchase unbundled elements of the incumbent's network and consistency demands that the same pricing methodology be applied throughout the 1996 Act.[73] Respondent admits however, that prospective attaching entities, unlike the entrants seeking access to an incumbent's telecommunications network, are not the pole owners' competitors in providing electric services.

34. Specifically, Respondent submitted an affidavit in which the affiant [74] ("Affiant I") claims to apply standard appraisal techniques and valuations for property similar to pole attachments. Respondent asserts that Affiant I concluded that there is an active and competitive market for communications corridors, clusters, and systems. Affiant I used three approaches to determine market value: a depreciated replacement cost plus enhancement approach, a sales comparison approach, and an income capitalization approach. In addition, Affiant I included a factor for entrepreneurial profit; used an economic-based depreciation rate calculated for Respondent (as opposed to a tax-based depreciation rate); and used a separate depreciation rate for purposes of determining the carrying charge to reflect that portions of capital could be reinvested over time. Affiant I concluded that Complainant should be paying an annual rate of $47 under the first approach; $25-$40 or $628 under the second approach; and $38.69-$64.48 under the third approach, leading to a reasonable range of $40-$55.

35. Respondent also provided another affidavit with its Response to the Complaint which purports to explain why the Commission's formula does not provide just compensation. In that affidavit, the affiant[75] ("Affiant II") incorporates a

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[73] Citing *Iowa Utilities Board v. FCC*, Case No. 96-3321, at 10 (8th Cir. 2000).

[74] Mr. Henry J. Wise, MAI.

[75] R.E. Prater, Manger, Power Dleivery Support for Alabama Power Company.

previous affidavit, filed in response to the Commission's pole attachment rulemaking proceedings.[76] Affiant II's affidavit may be summarized as follows: Affiant II asserts that Respondent's $38.81 rate does not include any enhancement value; the rate uses gross investment in calculating carrying charges; the rate reflects a conservative approach to the number of attaching entities; the rate for a telecommunications attacher is more than three times higher than the cable attacher rate; increasing costs in building and maintaining networks are not reflected in embedded costs; joint use agreements with telephone companies reveal rates between $26.29-$30.30; the formula should include more FERC accounts; the cable rate does not allow recovery for unusable space; the presumptions in the formula don't apply to Respondent; gross investment figures should be used without excluding costs for grounds and arrestors; gross investment figures should be used in the denominator of the carrying charges even though this will lower the rate; forward-looking cost of capital should be used but the calculation is internal and not publicly available; and finally, an enhancement value should be included. Affiant II concludes that the use of replacement costs plus every other factor Respondent requests yields a rate of $43.03.

2. Complainant's position

36. Complainant responds that the Bureau Order correctly determined that the combination of full recovery for make-ready or change-out costs, along with the full recovery of costs associated with the space used for the attachment, as well as a return on capital allowed under the Commission's formula provides just compensation to Respondent. Complainant asserts that the Constitution does not support Respondent's argument that it is entitled to a higher pole attachment rate than that calculated in accordance with the

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[76] CS Docket No. 97-98.

Pole Attachment Act and the Commission's regulations. Complainant argues that just compensation is determined by the loss to the person whose property is taken,[77] generally measured by one of three approaches: market value, the income approach, or the cost approach.[78] Complainant explains that in the case of pole attachments, none of the three approaches, market value, the income approach, or the cost approach applies. Complainant concludes that the Commission's formula, which is based upon payment of the operating expenses and actual capital costs of the utility, is consistent with the constitutional requirement of reimbursing loss to the owner of property. Complainant argues that Respondent failed to demonstrate a factual or legal basis for higher compensation than that provided by the Commission's regulations and the burden of proving loss, as well as the amount of any loss, is upon the party claiming to have experienced a taking.[79]

37. Regarding the market value approach, in the case of pole attachments, Complainant asserts that there is no market for attachments to utility poles. Complainant argues that the Supreme Court stated that "market value" is not an appropriate method for calculating just compensation "'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'" [80] Complainant states that attempting to calculate a

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[77] Citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987), quoting *United States v. Causby*, 328 U.S. 256, 261 (1946).

[78] Citing *United States v. Miller*, 317 U.S. 369, 374 (1942); Nichols on Eminent Domain, § 14A.06[2] and [3].

[79] Citing *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948).

[80] Citing *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984), (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984).

"market value" for pole attachment space would result in manifest injustice to the public because poles themselves are monopoly resources, for which no feasible substitutes exist and to monetize that monopoly value and attempt to embrace it as "market value" would preclude any remedy for monopoly abuses. Complainant points out that it has long been recognized by the courts,[81] Congress,[82] and the Commission,[83] that utility poles and like structures are essential facilities, mandatory corridors that communications services must share. Complainant asserts that Affiant I's attempt to calculate a "market value" for Complainant's pole attachments by comparing them to joint use agreements between Respondent and telephone companies and by analogizing to railroads and wireless communications towers is misguided. Complainant argues that joint use agreements are not relevant because telephone companies occupy more space than cable operators and because utilities specifically establish high fixed asset values in order to obtain compensation from state public service commissions. Complainant also questions Affiant I's lack of evidence of actual transactions.

38. Next, Complainant rejects the income approach because a pole attachment does not itself generate income and does not involve a taking of an entire business. Complainant asserts that the income approach is premised upon the idea "that a potential buyer will be willing to pay a price for an

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[81] Citing *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 247 (1987); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132, 1146-47 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *TV Signal Co. of Aberdeen v. American Tel. & Tel.*, 1981 U.S. Dist LEXIS 11080, *14-15 (D.S.D. 1981); and *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 851 (5th Cir. 1971).

[82] Citing 123 Cong. Rec. 35,006 (1977).

[83] Citing *Twixtel Technologies, Letter from FCC Common Carrier Bureau*, July 6, 1990 at 4; Section 214 Certificates, 21 F.C.C.2d 307, 323-29 (1970).

asset that reflects a present value of the future benefits (i.e., income) that the buyer can realize from the asset."[84] In the case of pole attachments, Complainant argues, Complainant does not obtain ownership of even a section of a pole, let alone an entire business. Per Complainant, Respondent's contract limits an attacher's rights to a mere license and attachments do not deprive Respondent of its business or displace its operations. In addition, Complainant argues, it is impossible to forecast a future income stream that would be tied to an attacher's use of a percentage of otherwise unused, excess pole capacity. Furthermore, Complainant argues that Respondent's claim that the income approach to valuation supports a five-fold increase in pole rents is baseless because Affiant I does not even attempt to follow a real income approach to valuation, which requires consideration of the anticipated future income generated by an asset and translation of that income stream into present value using an appropriate discount rate. Instead, according to Complainant, the appraiser simply postulates a pole replacement cost, an unrealistic three to five year payback period for utility poles, an inflated cable pole occupancy percentage of 27 percent, and then uses simple division to determine a figure for annual pole rental.

39. Finally, regarding the cost approach, Complainant argues that Respondent's use of reproduction costs does not make sense because it is not reasonable to reproduce existing utility poles. Complainant argues that the "cost approach" may be used to determine just compensation for pole attachments only if it is based upon actual costs because replacement cost valuation for pole attachments is inconsistent with the law on just compensation. Complainant asserts that a replacement cost approach requires that the property interest being condemned be complete ownership.[85] Complainant's

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[84] Citing *Nichols*, § 14A.06[3].

[85] Citing *Nichols*, § 14A.06[2][e].

pole attachments, Complainant argues, occupy only a fraction of Respondent's poles. In addition, Complainant asserts, courts do not apply a replacement cost approach to valuation if reproducing the property would not be a reasonable business venture.[86] Complainant continues that utility poles cannot be reasonably reproduced because they are an essential facility.[87] Complainant states that Affiant I's "share the savings" approach, in which the rental is compared to what cable operators would have to spend to reproduce something that zoning, environmental, and other restrictions prevent them from reproducing—a duplicate network of utility poles, does not have any basis in appraisal methodology. Complainant points out that Respondent never incurs any replacement costs when cable operators attach to Respondent's poles because, when additional space is needed, Respondent recovers its costs, dollar for dollar, in the form of make-ready charges.

40. Complainant argues that, in the context of negotiated contracts, the Supreme Court upheld the constitutional sufficiency of the compensation provided by the formula,[88] and that Respondent has not met its burden to show that the reasoning in Florida Power does not apply to mandatory access. Complainant disputes that Consolidated Gas,[89] cited by Respondent, has any precedential weight, because it was a dissent, not a holding of the court, and the entire case was vacated by the Supreme Court and dismissed with prejudice. Even so, Complainant argues that even under the reasoning of

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[86] Citing *United States v. Toronto, Hamilton & Buffalo Navigation*, 338 U.S. 396, 403 (1949).

[87] Citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

[88] Citing *FCC v. Florida Power Corp.*, 480 U.S. 245, 254 (1987).

[89] Citing *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 912 F.2d 1262, 1314-1316 (11th Cir. 1990), vacated, *City Gas Co. of Florida v. Consolidated Gas Co. of Florida*, 111 S.Ct. 1300 (1991).

Consolidated Gas, which required a reasonable rate of return on investment, the Commission's provision in the cable rate formula for fully allocated costs (including a return on capital) would provide Respondent with compensation that is constitutionally sufficient.

41. Finally, Complainant responds to Respondent's various specific issues regarding the pole rate formula's elements pertaining to usable space and pole height presumptions; the use ratio; particular utility cost accounts; and the use of historical costs. First, Complainant points out that Respondent has not met its burden of presenting the Commission with new evidence on any of these issues that would justify a rate greater than the current rate. With respect to usable space and pole height presumptions, Complainant argues that Respondent presents the same arguments and evidence that the Commission rejected in rulemaking proceedings.[90] Although the usable space figures used by the Commission are rebutable presumptions, Complainant argues that Respondent does not introduce sufficient evidence of differing pole height or minimum attachment heights for the specific plant at issue. Complainant also points out that Respondent's claim that its average existing pole height should be considered to be forty feet is based on average replacement pole height for the most recent year. Complainant also points out that, even if the Commission accepted Respondent's claim that its average pole height is forty feet, the resulting pole rate with all adjustments would be less than the current rate.

42. Complainant continues that Respondent's contention, that the Commission must apply the full cost allocator specified for telecommunications services, that is scheduled to be phased in over five years, to cable systems would have the undesirable consequence of greatly impeding the

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[90] Citing Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000) ("Fee Order").

development of the facilities-based competition intended by the 1996 Telecommunication Act. Complainant states that the cable rate space allocator of 7.4% requires cable attachers to pay the utilities' operating costs in the same proportion that the cable attachment bears to the total usable space on a utility pole. Complainant continues that the difference between rates calculated under the cable formula and the fully-phased in telecommunications formula may be insignificant, depending upon the number of competitive local exchange carriers ("CLECs") that attach to poles in the coming years.[91] Complainant argues that the gradualness of the increase in rates attracts and retains facilities-based competitors until a later stage in the development of a competitive market when there are a sufficient number of parties on the pole that a "per capita" allocation of pole costs does not create an undue burden on any of the attaching parties. By contrast, Complainant argues, if that full rate is implemented today, then the pole rate will artificially increase, creating a potentially insurmountable barrier to the deployment of new facilities and an incentive for a cable operator not to diversity into telecommunications.

43. Complainant disagrees with Respondent's contention that certain additional expense accounts should be included in the derivation of the pole rent. Complainant asserts that much of the argument and advocacy presented by the Respondent are lifted in their entirety from presentations made in a previous Commission pole attachment rulemaking proceeding,[92] the rulemaking, where it was considered and rejected. Complainant argues that Respondent fails to advance sufficient evidence to prove that any residual expenses related to poles that may be included in these accounts is significant or

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[91] Citing Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd. 6777 (1998).

[92] CS Docket 97-98.

that they would not would create a double charge against make-ready expenses.[93] Specifically, Complainant argues that clearing costs are already capitalized into FERC Account 364, which is included in the formula, and cable operators pay right-of-way and other related fees directly to the appropriate local government authority. Complainant argues that any allocation of land and land rights to poles (as opposed to aerial space) based on the data Respondent provided would only add four cents to the pole rate, which would still be less than the current rate. In addition, Complainant points out that grounding involves installing a conductor and ground rod to discharge power surges or to discharge induced current. Complainant states that cable operators are required to attach their facilities to the electric company ground, but existing power company grounding systems are not sufficient to ground these system components and each attaching party is responsible for grounding its own system of conductors.[94] Excluding grounding systems, Complainant argues, is also consistent with FERC accounting and recent public service commission authority.[95]

44. Complainant argues that the practice of having cable operators pay make-ready and change-out costs assures that any actual replacement costs associated with pole attachments are borne by the attaching party, and in accordance with this practice, Respondent receives over one million dollars per year from cable operators through make-ready reimbursements. In addition, Complainant argues, Respondent's proposed calculation of carrying charges times replacement cost results in a recovery of nearly three times the administrative

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[93] Citing Fee Order at ¶ 61 and Declaration of Patricia D. Kravtin, CS Docket No. 97-98, ¶¶ 45-48.

[94] Citing Complainant's Reply at 46-50 and Declaration of John Pietri, at ¶¶ 8-10, CS Docket No. 97-98.

[95] Citing 18 C.F.R. Part 101 (Account 365) and *Consumers Power Co., et al.*, Case No. U-10831 at 23.

overhead and taxes that Respondent actually incurs, and fails to account for accumulated deferred taxes. Complainant argues that Respondent's inclusion of an unsupported "entrepreneurial incentive" is inconsistent with its existing regu latory obligation to erect and maintain poles. Complainant points out that the Commission's approach has been corroborated by state public service commissions in California,[96] Michigan,[97] New York,[98] and elsewhere,[99] that have affirmatively rejected using reproduction costing for pole attachments, and by the utilities' own use of embedded costs to establish the financial arrangements with telephone utilities under joint use agreements. Complainant concludes that the use of historic costs in determining pole attachment rates also meets appraisal standards for currency and reliability.

3. Discussion

45. We begin our review of the issue raised by Respondent, whether the Commission's pole attachment rate formula provides just compensation under the Fifth Amendment to the United States constitution, by picking up the analysis at the point where the Supreme Court last addressed it some years ago. In *Florida Power*, the Supreme Court was faced with

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[96] Citing Cal. Pub. Util. Code § 767.5 (Deering 1996).

[97] Citing *Consumers Power Co. et al., Mich. Pub. Serv. Comm'n.*, Case Nos. U-10741, U-10816, U-10831 at 20 (Feb. 11, 1997), *aff'd, Detroit Edison Co. v. Michigan Public Service Commission*, Slip. Op., No. 203421 (Mich. App. Nov. 24, 1998), *appeal denied, Detroit Edison Co. v. Michigan Public Service Commission*, 602 N.W.2d 386 (Mich. 1999).

[98] Citing In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues, N.Y. Pub. Serv. Comm'n. Case No. 95C-0341 at 11 (June 17, 1997).

[99] Citing Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services, Georgia Pub. Serv. Comm'n, Docket 7061-U (October 21, 1997).

this very issue, the constitutional sufficiency of the pole attachment rate formula. The *Florida Power* court first addressed whether the Pole Attachment Act in effect at that time, which did not include a mandatory access provision, authorized a per se taking of property as that term was defined in *Loretto v. Teleprompter* ("*Loretto*").[100] In *Loretto*, the court determined that a New York statute that required a rental property owner to permit cable attachments to its rental property effected a taking for which just compensation is due. The *Loretto* Court concluded that in cases where a regulation restricting the use of property amounts to a physical occupation, there is a taking to the extent of the occupation, without regard to other factors that a court might ordinarily examine such as "the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action."[101] The *Loretto* Court did not express an opinion on the amount of compensation due.[102] In *Florida Power*, the court concluded that the Pole Attachment Act did not authorize a taking under the *Loretto* physical invasion test. The Court stated, in reference to the application of a per se taking rule, that it did not decide what the application of *Loretto* would be "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements."[103]

46. The *Florida Power* court dealt with the *Loretto* issue because it was reviewing the lower court's conclusion that the Pole Attachment Act effected a per se taking of property, and the lower court's conclusion that, because the Pole Attachment Act authorized the Commission to make the initial

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[100] 458 U.S. 419 (1982).

[101] *Loretto* at 432.

[102] *Id.* at 441.

[103] *Florida Power* at 252, n.6.

determination of compensation, a judicial function, it was unconstitutional. The Supreme Court reversed the lower court on both issues. The most important aspect of *Florida Power*, for purposes of our review of the issue now before us, is the court's treatment of the remaining question, whether, under traditional Fifth Amendment analysis, the Commission's pole attachment rate formula effected a taking of property without just compensation. The Court concluded that it did not. The Court stated that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory."[104] The *Florida Power* court squarely determined that the compensation provided by applying the Commission's pole attachment formula is constitutionally sufficient.

47. In reaching this conclusion, the Court stated that "[I]t is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible" [105] . . . "so long as the rates set are not confiscatory." [106] In *FPC v. Hope Natural Gas Co.* ("*Hope Natural Gas*"),[107] in the context of rate regulation, the Supreme Court concluded that "[u]nder that statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." [108] The *Hope Natural Gas* Court continued that "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid . . ." [109] In *Duquesne Light Co. v. Barasch*,

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[104] *Id.* at 254.

[105] *Id.* at 253.

[106] *Id.*

[107] 320 U.S. 591 (1944).

[108] *Id.* at 602.

[109] *Id.* at 605.

("*Duquesne Light*")[110] the Supreme Court summarized the history of the development of the standard for reviewing rate regulation, beginning with Justice Brandeis' dissent in *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*,[111] and noting that "[p]erhaps the most serious problem associated with the fair value rule was the 'laborious and baffling task of finding the present value of the utility'",[112] and that the "test usually degenerated to proofs about how much it would cost to reconstruct the asset in question, a hopelessly hypothetical, complex and inexact process."[113] The *Duquesne Light* court stated that "[f]orty-five years ago in the landmark case of [*Hope Natural Gas*], this Court . . . held that the 'fair value rule' is not the only constitutionally acceptable method of fixing utility rates. In [*Hope Natural Gas*] we ruled that historical cost was a valid basis on which to calculate utility compensation."[114]

48. In *Florida Power*, the Supreme Court appropriately applied this standard of review to the Commission's pole attachment rate formula and found that the formula did not effect a taking of property without just compensation. The Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making

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[110] 488 U.S. 299 (1989).

[111] *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923).

[112] *Duquesne Light* at 309, n.5 (citation omitted).

[113] *Id.* (citation omitted).

[114] *Id.* at 310.

space available to the cable operator. In addition to these charges, the attacher pays a proportionate share of pole capital costs and operating expenses based on the amount of space occupied by the attachments. The Commission's pole attachment rate formula for cable attachers allocates the cost of the entire pole by the percentage of total usable space used. The formula includes recovery for all pole-related costs, including administrative, maintenance, and tax expenses, as well as depreciation and a rate of return approved by the utility's state public service commission. The Supreme Court determined that this formula results in a rate that is not confiscatory.[115] Under the *Florida Power* standard of review for regulated rates, the current pole attachment formula for cable attachments, which is substantially unchanged from that reviewed by the *Florida Power* court, provides just compensation.

49. On February 8, 2001, pursuant to the Pole Attachment Act, a second rate became effective for telecommunications attachers. The telecommunications pole attachment rate is similar to the cable attachment rate with the sole exception being a different methodology for determining the proportion of pole space that is attributable to the attachment. Pursuant to statutory mandate, the telecommunications pole attachment rate allocates the cost of the unusable portion of the pole to an attacher based on the total number of attaching entities rather than on the portion of usable space occupied by the attachment. Congress' decision to choose a slightly different rate methodology, more suited in its opinion to telecommunications service providers, does not call into question the constitutionality of the cable rate formula. The existence of a difference between the formulas does not arise to a constitutional issue, because both formulas provide just compensation under the Fifth Amendment. In *Duquesne Light*, the

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[115] *Florida Power* at 254.

Court reiterated that "'rate-making power is a legislative power and necessarily implies a range of legislative discretion.'" [116] Congress used its legislative discretion in determining that cable and telecommunications attachers should pay different rates. The end result of the application of the telecommunications pole attachment formula is a rate which reflects the fully allocatedcosts of the pole-related expenses and is therefore, not confiscatory under the *Florida Power* test. Because the end result is not confiscatory, it satisfies the Fifth Amendment requirement that property not be taken without just compensation. As the *Duquesne Light* court stated, "the commission[117] 'must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.'" [118] Under the *Florida Power* test, both the cable and telecommunications pole attachment rate formulas provide the utilities with rates that are constitutionally sufficient.

50. Although *Florida Power* is settled law, the question of the constitutional sufficiency of the Commission's pole attachment rates has been raised by Respondent. Confusion about the issue has arisen following the Eleventh Circuit Court of Appeals' decision in *Gulf Power I*, which held that, under the reasoning of *Loretto*, the 1996 Act's mandatory access amendments to the Pole Attachment Act effect a taking of property. Based on its finding in *Gulf Power I*, in *Gulf Power II*, the Eleventh Circuit found that the Commission's regulations implementing the 1996 Act amendments to the Pole Attachment Act also authorize a taking of

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[116] *Duquesne Light* at 313 (quoting *Minnesota Rate Cases*, 230 U.S. 352, 433).

[117] State of Pennsylvania Public Utilities Commission (footnote not in original).

[118] *Id.* at 313-314 (emphasis in original) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 767).

property. Both opinions reserved on the issue of whether the statute or the regulations provide just compensation under the Fifth Amendment to the Constitution, stating that the issue was not ripe for review.[119] In *Gulf Power I*, utilities made essentially the same argument that Respondent makes, that " because a utility's property is now being taken, the rate it was able to collect when it was voluntarily providing access is no longer appropriate. This is so, they argue, because the standard for determining just compensation for a taking should be more rigorous than that for determining a rate for providing voluntary access." [120]

51. Respondent's argument misinterprets the extent of the holding in *Gulf Power I* and *II*. The courts' finding, that the mandatory access provisions of the Pole Attachment Act and the Commission's regulations authorize a taking, merely changes the initial focus of the review of pole attachment rates set using the Commission's formula. Instead of first examining the "character of the governmental action" [121] the review proceeds directly to the measure of compensation. However, that measure of compensation is not changed simply because the regulation restricting the use of property amounts to a physical occupation under *Loretto*. Changing the nature of access from voluntary to mandatory did not change the extent of the property occupied. The essential nature of the regulation, a restriction on the price that a utility may charge for attachments to its monopoly-owned poles, remains unchanged. The constitutional measure of value of that property is the same as the measure that has been used since *Hope Natural Gas*, if the end results of the regulations are "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and

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[119] *Gulf Power I* at 1338; *Gulf Power II* at 1272-73.

[120] *Gulf Power I* at 1337.

[121] *Loretto* at 432.

to compensate its investors for the risks assumed . . .",[122] then the regulations are constitutionally valid. The Commission's formula uses the same public information that is gathered in other federal and state rate-making processes, processes that are constitutionally sufficient under the *Hope Natural Gas, Duquesne Light* and *Florida Power* standard of review, to calculate the pole attachment rate.

52. The Commission's formula enables a utility to recover all of the costs that are attributable to the pole attachment. The property at issue, excess, unused pole attachment space, is the same whether the attachment is obtained through voluntarily signed contracts or through mandatory access. The Respondent has voluntarily entered into a regulated industry and voluntarily used its poles for wire communications. Respondent's belief that it is entitled to obtain a higher return on pole attachments that are not voluntarily negotiated has no constitutional basis; the utility pole space is the same property used by Respondent in its regulated core business and is only a small portion of otherwise unused property. The Commission's formula, by providing Respondent with reimbursement of its operating expenses and its cost of capital proportionate to the space used by an attachment, enables Respondent to continue to operate successfully, maintain its financial integrity, attract capital, and compensate its investors at a rate approved for property devoted to the operation of a regulated industry. The Commission's formula relies on the latest year-end actual publicly reported costs of utilities and assures just and reasonable rates to both the utility and the attaching parties, establishes accountability for prior cost recoveries, and accords with generally accepted accounting principles. We affirm the Bureau's determination that the Commission's formula provides just compensation to a utility for the use of its poles for attachments by cable system operators.

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[122] *Hope Natural Gas* at 605.

53. In essence, Respondent argues that we should apply a different analysis to determine just compensation. Even if we were to assume, for the sake of argument, that Respondent's argument has merit, we would still end up with the same measure of compensation. The objections to other measures of just compensation for rate regulations, objections which lead to the development of the standard applied in *Florida Power*, and which are summarized in *Duquesne Light*, are just as valid in this case as in any preceding rate case. In *United States v. Commodities Trading Corp.*,[123] the Supreme Court stated that it "has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases." [124] Just compensation is generally determined by the loss to the person whose property is taken,[125] keeping in mind that "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" [126] The determination of just compensation centers on putting the property owner in as "good position pecuniarily as he would have occupied if his property had not been taken." [127] One common measure of loss is the fair market value of the property taken. Fair market value represents a price that reflects what a purchaser in fair market conditions would pay for the property.[128] However, the Supreme Court has concluded that where a property has no market, when market value is too difficult to find, or when the application of a market value standard would result in manifest injustice, other standards and other data must be applied.[129] Because of

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[123] 339 U.S. 121 (1950).

[124] *Id.* at 123.

[125] *United States v. Causby*, 328 U.S. 256, 261 (1946).

[126] *United States v. Commodities Trading Corp.*, 339 U.S. at 124.

[127] *United States v. Miller*, 317 U.S. at 373.

[128] *United States v. Miller*, 317 U.S. 369, 374 (1942).

[129] *Id.* at 374; *United States v. Commodities Trading Corp.*, 339 U.S. at 123.

the unusual nature of pole attachments, and the nature of the property interest conveyed, the three standard appraisal techniques for determining market value, comparable sales, income capitalization, and replacement costs less depreciation, are particularly unsuited for valuing pole attachments.

54. We find Complainant's argument and supporting evidence on this issue to be persuasive. We agree with Complainant that the nature of cable television pole attachment rights and interests, and the monopoly inherent in the poles owned by Respondent and other utilities, affect the measure of compensation. Cable attachers generally have no practical or cost-effective alternative to attachments to existing poles. In any specific area, there is only one provider of pole space and there is usually surplus space on those poles. In this case, and in many other cases, the cable attacher is already on the pole and conducting business and there is no viable alternative. The rates, terms and conditions of pole attachments are regulated because of the bottleneck monopoly status of the utilities' poles. Although utilities continue to argue that poles are no longer bottleneck facilities, no credible evidence of this has ever been presented to the Commission and it certainly cannot be argued that cable operators who already have attachments to utility poles have any other reasonable options to pursue.

55. Despite Respondent's and other utilities' arguments to the contrary, there is no non-monopoly market in pole attachments. There are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments. Respondent has a monopoly on pole attachments in its service area and any rents it negotiates with other service providers not covered by the Commission's pole attachment rate formula reflect a monopoly value. Respondent's comparisons to other industries, technologies and property rights are inapposite because the property interests involved are too different to draw any meaningful

conclusions. Respondent was unable to show that there is any reasonable way to evaluate a pole attachment value using a comparable sales approach.

56. Under the income capitalization method, the value of a particular piece of property is shown by calculating the present value of the income the property could be expected to generate over its useful economic life.[130] "[F]or a court to allow value to be proved in such a suspect manner, impeccably objective and convincing evidence is required."[131] This approach is impossible or inappropriate in cases in which the property involved either produced no income, or the income was far too speculative to rely on.[132] Complainant reasonably argues that the income approach to valuation is inappropriate because the income generated by a cable television system is the product of many tangible and intangible assets and cannot be attributable to its pole attachment. Respondent listed several different types of valuations under the heading of the income capitalization approach, but none of these valuations even approximate an income capitalization methodology. Respondent failed to meet its burden to show that this methodology is required or even appropriate for pole attachments.

57. Respondent's final attempt at appraisal, using replacement costs less depreciation with or without the addition of an enhanced value, also fails. As Complainant points out, the ownership interest in the space occupied by a pole attachment is a limited property interest, restricted in duration, primacy, exclusivity, and physical manner of use, all of which affect

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[130] *Snowbank Enterprises, Inc. v. United States*, 6 Cl.Ct. 476, 486 (1984).

[131] *United States v. 69.1 Acres of Land*, 942 F.2d 290, 294 (4th Cir. 1991).

[132] *Seravalli, et al. v. United States*, 845 F.2d 1571, 1574-1575 (Fed. Cir. 1988).

the determination of value of the interest conveyed. A pole attachment does not displace the utility from its own use of the pole or from the right to license additional users on the pole. Because the utility's interest in the property is not completely destroyed, requiring the use of replacement costs as a measure of just compensation is inappropriate. Also, it is not feasible to reproduce existing utility poles. Zoning, environmental, local government, and financial constraints make it impractical and often impossible to construct new pole systems. Respondent was unable to offer a reasonable proposal for implementing this methodology, opting instead for a permutation of the Commission's formula, manipulating the various elements to result in a higher rate. Although Respondent argues that the replacement cost appraisal methodology will result in higher pole attachment rates, this theory is not supported by Respondent's calculations. Many of the changes in methodology that Respondent incorporates in its calculations, such as the amount of space occupied, the average number of attaching entities, pole height presumptions, inclusion of lightning arresters and grounding equipment, entrepreneurial incentives, and other increased expenses are not related to a replacement cost methodology. We also find that Respondent, and pole owners in general, are not entitled to an enhanced value or network value for pole attachments. Complainant reasonably argues that the utility is not conveying to the attacher the right to be in the public right-of-way, which is granted by the local franchising authority for a fee, nor does the utility provide the attacher with a complete corridor of access to a network of customers. We find Complainant's arguments persuasive on this issue.

58. The Commission's formula has been used successfully over the years by the Commission and various states [133] to

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[133] As Complainant points out, the majority of states that have certified to regulate pole attachment rates rely on an historic cost methodology. Complainant cites Cal. Pub. Util. Code § 767.5 (1999); Order Instituting

promote reasonable, affordable, predictable, and nondiscriminatory access to poles for cable television systems. Preventing utilities from setting rates for pole attachments at levels that are well in excess of their actual costs and well above the costs that they attribute to themselves in pricing services that compete directly with those offered by attachers, precludes utilities from establishing an unfair and unjustified competitive advantage and improperly discriminating against their competitive rivals. Respondent has not supported its assumption that the constitutional requirement of just compensation entitles Respondent to a higher pole attachment rate than that calculated in accordance with the Pole Attachment Act and the Commission's rules. Respondent has not provided any credible evidence that shows that the Respondent is not compensated fully under the formula and placed in the same position monetarily as it would be but for the attachments. The Commission's cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation. In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct as part of its core service. Respondent carries the burden to show that the Commission's formula does not provide just compensation.[134] We find that Respondent has

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Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Decision No. 98-10-058 (Cal. PUC Oct. 22, 1998); *In the Matter of the Proceeding on Motion of the Commission to Consider Certain Pole Attachment Issues*, New York Pub. Serv. Comm'n Case No. 95-C-0341, 1997 N.Y. PUC LEXIS 364 (Issued and effective June 17, 1997), *recon. denied*, 1997 N.Y. PUC LEXIS 639 (October 7, 1997); *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, Georgia Pub. Serv. Comm'n Docket 7061-U, October 21, 1997.

[134] *See Hope Natural Gas* at 602 ("It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate

not met its burden to show that one of its three appraisal methodologies must be used to measure the value of just compensation. We also find that Respondent did not provide sufficient and credible evidence to support its claim to the $38.81 rate. We therefore affirm the Bureau Order's rejection of Respondent's proposed justification of its $38.81 rate.

59. Respondent also challenged specific aspects of the formula, including the formula presumptions for pole height and usable and unusable space. We agree with Complainant that Respondent has not met its burden of presenting the Commission with new evidence that would justify the adoption of different presumptions by the Commission. We have already rejected utility arguments supporting a change in the pole height presumption because the evidence presented was not sufficient to change the presumption of an industry wide average pole height of 37.5 feet.[135] However, in any individual complaint proceeding, the pole height presumption may be overcome with credible evidence that the utility's poles have a different average height. In this case, Respondent could have offered evidence of the specific height data for its cable-attached poles, but instead, Respondent claimed that its average existing pole height should be considered to be forty feet based upon its claim that its average replaced pole in 1999 is approximately forty feet. There is no evidence to support a conclusion that average height of the poles replaced in 1999 reflect the system-wide pole height average. Respondent's proffer is not sufficient or even appropriate data to overcome the presumption of 37.5 feet.

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order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (citations omitted)); *see also Permian Basin Area Rate Cases* at 767.

[135] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000).

60. Regarding usable space presumptions, Respondent has not provided data that would overcome the formula presumption of 13.5 feet of usable space on a 37.5 foot pole or the presumption that an attacher uses one foot for its attachment. Respondent also claims that the cable rate formula does not require cable attachers to pay their fair share of unusable space and that cable operators must pay the telecommunications rate in order to provide just compensation to the utility. Respondent's repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation.

61. Respondent also argues that the absence of particular FERC utility cost accounts in the Commission's formula renders it constitutionally deficient. Respondent admits that it has raised these arguments before, and advances no new evidence to indicate that the expense accounts it identifies must be appropriately included in the formula. We have thoroughly reviewed all of the information provided on this topic by Respondent and Complainant as well as the description of the FERC accounts contained in 18 C.F.R. Part 101 and find no evidence that these accounts contain any significant costs that should be allocated to a pole attachment. Each account contains costs that relate to the utility's core business function of energy distribution and it would not be reasonable or just to include these accounts in a calculation of a pole attachment rate. Respondent argues that administrative efficiency is not a good enough reason for excluding certain accounts. However, administrative efficiency alone is not the basis for the decision to exclude certain accounts. It was based first on the description of the accounts. The insignificance of the relationship of these accounts to pole

attachment costs are what dictate that a full scale ratemaking proceeding to identify every item in the regulatory accounts would be inequitable. As the Supreme Court stated in *Duquesne Light*, "[i]nconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect." [136] In addition, adding accounts containing engineering expenses that are paid for through make-ready expenses would result in a double charge to attachers.

E. Arbitrary and capricious agency action

62. Finally, Respondent argues that the Order constitutes arbitrary and capricious agency action because the Bureau failed to analyze the issue of just compensation and did not address Respondent's evidence concerning rebuttable presumptions in the pole attachment regulations. Complainant disputes Respondent's allegations. Respondent mischaracterizes the Bureau Order. We disagree with Respondent that the Bureau Order was based on arbitrary or capricious decisionmaking. The Complaint was filed in response to the unilaterally imposed $38.81 pole attachment rate, not the negotiated rate of $7.47. The Bureau's first task was to determine if the $38.81 rate was just and reasonable in accordance with the Commission's rules. Because Respondent made no attempt to justify the $38.81 rate using the Commission's rules, and based on the record before us, the rate in fact violated our rules, the Bureau did not err when it found the rate to be unreasonable. Second, the rebuttable presumptions are only pertinent to a rate calculated using the Commission's formula. As discussed above in paragraphs 59-61, Respondent did not offer evidence that would overcome the presumptions used in the formula in this particular application of the formula. The Bureau Order merely noted that the various rates calculated by Complainant using Respondent's financial

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[136] *Duquesne Light* at 314.

information did not result in a rate higher than $7.47, even assuming that Respondent was successful on certain issues. The Bureau was not under an obligation to specifically address those issues which could not affect the final outcome by increasing the $7.47 rate agreed to by the parties. The Bureau is also not required to resolve hypothetical questions. In resolving a pole attachment complaint, the Bureau is not required to revisit the same issues that have already been raised and rejected by the Commission in a rulemaking proceeding. We find that the Bureau properly considered all pertinent evidence. Thus the Bureau Order was not the result of arbitrary and capricious action.

63. Respondent also claims that the Bureau Order is arbitrary and capricious because the Bureau Order improperly relied on administrative convenience as the basis for its decision. We find Respondent's allegations to be completely without merit. Although the Bureau Order considered the congressional and Commission policy to avoid a prolonged and complex rate setting methodology for pole attachments in its deliberations, as indicated above, the Bureau's decision was based on a number of substantive factors. Respondent further argues that the Bureau Order is internally inconsistent because it first acknowledges, in accordance with Commission regulations, that further negotiations between the two parties are likely to be fruitless, in the absence of Commission resolution of the issues raised in the Complaint, and then later orders the parties to negotiate in good faith in accordance with the guidance provided in the Order. Respondent believes this cannot be classified as reasoned decision making. We find Respondent's charges to be without reason or foundation. Every complaint proceeds on the finding that the parties' negotiations have failed over unresolved issues. Resolving the issues for the parties and ordering further negotiations is a just and reasonable decision. We conclude that the Bureau Order is neither arbitrary nor capricious.

64. Respondent also argues that the Commission's continued use of historical costs in the pole attachment rate formulas constitutes arbitrary and capricious action in violation of 5 U.S.C. § 706(2)(A). Respondent observes that the Commission applies a different methodology in the context of universal service requirements and interconnection agreements as opposed to pole attachments. Respondent argues that consistency demands that the same pricing methodology be applied throughout the 1996 Act. We disagree with Respondent's argument that the Commission's continued use of a historical cost methodology in the pole attachment context is arbitrary and capricious. As explained in detail below, the Commission had a rational basis, amply supported by record evidence, for choosing different pricing methodologies in these different contexts.[137]

65. In the Universal Service Order[138] and Local Competition Order,[139] the Commission reasonably and in detail explained that, in connection with universal service requirements and interconnection agreements, ratemaking on the basis of forward-looking economic cost would best effectuate the new competitive objectives of the 1996 Act. These objectives were to stimulate direct competition in local telecommunications markets, to ensure the efficient use of existing telecommunications network facilities, and to encourage new entrants to make economically rational decisions about

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[137] *See Federal Communications Commission, et al. v. National Citizens Committee for Broadcasting, et al.*, 436 U.S. 775, 803 (1978). *See also, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (the standard of review of an agency action for arbitrariness or capriciousness is a deferential standard by which a reviewing court will uphold an agency action if its has a rational basis).

[138] Federal-State Joint Board on Universal Service, FCC 96J-3, 12 FCC Rcd 87 (1997).

[139] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, 11 FCC Rcd 15499 (1996).

whether or how to enter a local telecommunications market.[140] The Commission found the use of a forward-looking cost methodology particularly important in this context because we determined that a firm compares forward-looking costs with existing market prices, in making decisions about entry, expansion, and price.[141]

66. By contrast, the predominant legislative goal for Congress in enacting the Pole Attachment Act was "to establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[142] Due to the local monopoly in ownership or control of poles, the legislative record indicated that some utilities had abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for access by cable companies to their pole space.[143] This actual and potential anti- competitive behavior prompted Congress to pass the Pole Attachment Act. It was in this context that the Commission, guided by Congressional direction to use existing accounting measures to determine costs, decided to employ a historical cost based pole attachment formula in implementing the Pole Attachment Act.[144] There is nothing

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[140] Local Competition Order, 11 FCC Rcd at 15813, 15817, 15846 (¶¶ 620, 630, 679).

[141] Local Competition Order, 11 FCC Rcd at 15813, 15846 (¶¶ 620, 679).

[142] S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 109.

[143] *Id.*

[144] *See* In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59 (1979).

novel about the Commission's use of a historical cost methodology in the context of regulating monopoly rates. For example, to carry out the statutory goal of section 623(b) of the Communications Act—i.e., to ensure that individual retail subscribers of monopoly cable providers were not exploited—the Commission, in addition to using a benchmark approach, also adopted a historical, cost-of-service alternative methodology for the cable television industry.[145]

67. The Commission's continued use of a historical cost methodology in the pole attachment context is consistent with Congressional expectations. Specifically, while the Commission's pole attachment formula has been in place since 1978, Congress did not directly or by implication instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1996.[146] By comparison, the local competition provisions of the Telecommunications Act of 1996 contemplated some degree of departure by the Commission from its past practice of setting rates on the basis of rate based/rate-of-return regulation.[147] Specifically, section 252(d)(1)(A)(i) requires that rates be based on the "cost" of providing the interconnection or network element "determined without reference to a rate-of-return or rate-based proceeding."[148]

68. In addition, the benefits of using a forward-looking cost methodology are less pronounced in the pole attachment context than in the universal service/interconnection context.

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[145] 47 U.S.C. § 543(b); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulations, 9 FCC Rcd 4527 (1994). *See also Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 178-87 (D.C.Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996).

[146] *See* S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. (1996).

[147] *See* Local Competition Order, 11 FCC Rcd at 15857 (¶ 704).

[148] 47 U.S.C. § 252(d)(1)(A)(i).

The Pole Attachment Act protects cable and telecommunications attachers from monopoly prices set by utilities that are not necessarily in direct competition with the attachers, although there may be potential for direct competition.[149] The Pole Attachment Act does not set out a scheme for attachers to access the network elements of a utility's core business. The majority of poles nationwide are owned or controlled by electric utilities, with the remaining poles owned or controlled by telephone companies.[150] Thus, while in some cases pole owner and attacher may both provide telecommunications services, most typically a cable attacher, as is true in this case, or telecommunications attacher is seeking relief under the Pole Attachment Act from the rates, terms and conditions imposed by an electric utility pole owner. In the telecommunications interconnection context, on the other hand, the statute sets out a scheme for determining rates solely between competing telecommunications carriers. Thus, rate regulation in the context of pole attachments is not focused primarily on the same concerns that predominate with interconnection.

69. In addition, the assets being regulated in the two contexts are very different. The Pole Attachment Act addresses access to poles, ducts, conduits and rights-of-way, in contrast to the unbundled elements of an incumbent's telecommunications network that are addressed in the interconnection context. These telecommunications network elements, in contrast to poles, ducts and conduits, are subject to a rapidly changing technology. A forward looking cost pricing methodology reflects the cost of replacing the functions of an asset

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[149] We recognize that increasing convergence of services and electric utilities' entry into telecommunications may change this situation in the future.

[150] *See* 1977 Senate Report. In the 1977 Senate Report, Congress also noted that poles owned by cable companies were less than 0.1 percent of the total number of poles nationwide. There is nothing in the record to suggest that this percentage has markedly changed.

using the most efficient technology available so as to appropriately capture the technological changes that are occurring.[151] As a result, new entrants are given the proper cost signals to decide whether to construct their own networks or to use the incumbent's. In the context of pole attachments, there has been significantly less change in the nature of the asset since their deployment decades ago, so it is not as critical to employ a formula that accounts for such factors. Indeed, given the nature of the pole attachment asset, the two methodologies—i.e., historical and forward looking—may likely produce similar cost results in the pole attachment context.[152] In addition, cable attachers frequently do not have a realistic option of installing their own poles or conduits both because, in many cases, attachers are foreclosed by local zoning or other right of way restrictions from constructing a second set of poles of their own and because it would be prohibitively expensive for each attacher to install duplicative poles.[153] Thus, because attachers frequently do not face a realistic "make or buy" decision, the benefits of giving proper cost signals to new entrants are less pronounced in the pole attachment context. Moreover, the pole attachment formula does account for the costs incurred when poles are replaced by utilities in the normal course of their business because the formula uses actual year end asset and expense data from records maintained and publicly reported as part of

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[151] *See* 47 C.F.R. § 51.505(b)(1) (forward-looking cost "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration").

[152] *See* Local Competition Order, 11 FCC Rcd at 1585 (¶ 705) (stating that it cannot be determined in the abstract whether a forward-looking cost approach or a historical approach will produce higher cost figures in a particular setting).

[153] In addition, it is not clear that a policy which would encourage the erection of multiple duplicative poles in the public right of way is consistent with the Pole Attachment Act.

the utilities' regulated core electric or telephone business services. In fact, if a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole.[154]

70. We have recognized that the continued use of the historical cost based pole attachment formula brings certainty to the regulatory process. For more than two decades,[155] the pole attachment formula has provided a stable and certain regulatory framework, which may be applied "simply and expeditiously" requiring "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[156] We have found that switching to a methodology based on forward-looking economic costs would significantly change and burden the Commission's processes, requiring the Commission to develop a new formula, which would necessitate a protracted rulemaking proceeding involving complicated pricing investigations.[157] We have acknowledged that, in

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[154] If there is not adequate space on an existing pole for an attacher, the attacher is usually required to pay up front to replace the pole with a larger pole. The Commission has never held that the Pole Attachment Act, which anticipates a range of reasonable rates, prohibits a utility from being directly compensated by an attacher for such incremental, non-recurring costs. Alternatively, a utility could include an allocated portion of these costs in its annual rental rate, but most utilities prefer to recover up front, the full amount of make-ready or pole change out costs. Such costs are required to be excluded from the annual rate calculation to avoid a double recovery by the utility. *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at 28 (2000).

[155] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

[156] *See* 1977 Senate Report at 21 (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

[157] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 9 (2000).

certain contexts, setting prices on the basis of forward-looking economic costs has advantages, such as giving the appropriate signal for new entrants to invest in network facilities; but, as explained above, these advantages are less pronounced in the pole attachment context because pole attachers are less likely to build, or may be prohibited from building, their own poles and conduit.[158] We have concluded and continue to find that, in the context of pole attachments, the continued use of historical costs accomplishes the key objectives of assuring just and reasonable rates to both the utility and the attaching parties, establishing accountability for prior cost recoveries, and encouraging negotiation among the parties by providing regulatory certainty.[159] We conclude that the Bureau's application of the Commission's pole attachment formula is neither arbitrary nor capricious.

V. CONCLUSION AND ORDERING CLAUSE

71. For the reasons discussed above, we conclude that Respondent's application for review and petition for emergency stay should be denied.

72. Accordingly, IT IS ORDERED, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review of Alabama Power Company seeking reversal of *In the Matter of Alabama Cable Telecommunications Assoc., et al. v. Alabama Power Company*, PA 00-003, DA 00- 2078 (released September 8, 2000), IS DENIED and the referenced Petition for Emergency Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
Magalie Roman Salas
Secretary

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[158] *Id.*

[159] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 10 (2000).

EXHIBIT

List of Documents Filed in PA 00-003

Complaint

Complainant's Petition for Temporary Stay

Respondent's Motion to Dismiss Complaint and Petition for Stay

Respondent's Answer to Petition for Temporary Stay

Complainant's Opposition to Motion to Dismiss Complaint and Petition for Stay

Respondent's Motion for Leave to File Motion for Confidential Treatment of Commercial and Financial Information

Respondent's Response to Complaint and Motion for Confidential Treatment and Financial Information

Complainant's Motion for Extension of Time

Respondent's Motion to Strike

Respondent's Declaration of R.E. Prater

Respondent's Declaration of R.E. Prater (original signature)

Order, DA 00-1847

Complainant's Opposition to Respondent's Motion to Dismiss

Complainant's Supplement (to amend Exhibits 1,2,3,4,9 and 15 of the Complaint)

Respondent's Letter regarding Confidentiality Agreement

Complainant's Reply to Response and Opposition to Motion for Confidential Treatment

Complainant's Second Supplement (to amend Exhibits 1,2,4,9 and 15 of the Complaint)

Respondent's Motion to Strike and Reply to Opposition to Motion for Confidential Treatment

Order, DA 00-2078

Respondent's Resume of Rodney W. Frame (Part of Mr. Frame's Affidavit)

Application for Review

Emergency Petition for Stay Pending Judicial Review

Respondent's Motion for Leave to File Supplemental Authority

Respondent's Notice of Filing Supplemental Authority (affidavit of Henry Wise)

Respondent's two Letters which were inadvertently omitted from its Emergency Petition for Stay

Respondent's Original Affidavit (with original signature of Henry J. Wise)

Respondent's Letter (transmitting electronic documents)

Complainant's Opposition to Application for Review, Emergency Petition for Stay and Motion for Leave to File Supplemental Authority

Respondent's Reply to Opposition to Motion for Leave to File Supplemental Authority

Respondent's Reply to Opposition to Application for Review

Complainant's Letter updating the matter of confidential treatment for Respondent

Concurring Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of Alabama Cable Telecommunication Association, *et. al.*

I concur with several of the conclusions reached in this case. While the Commission must be observant of the Fifth Amendment when it implements and enforces Section 224 of the Act, the conclusions it reaches are always subject to judicial review for consistency with the law and the Constitution. The Commission should respect the role of the U.S. Court of Appeals for the 11th Circuit in deciding the question of whether compensation was just in this particular proceeding.

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION (F.C.C.)

[File No. PA 00-003]

DA 00-2078

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION;
COMCAST CABLEVISION OF DOTHAN, INC. *et al.*,
Complaint,

v.

ALABAMA POWER COMPANY,
Respondent.

Adopted: September 8, 2000
Released: September 8, 2000

By the Deputy Chief, Cable Services Bureau:

1. On June 23, 2000, the above-captioned Complainant filed a pole attachment complaint ("Complaint") with the Federal Communications Commission ("Commission") against the above-captioned Respondent pursuant to Section 224 of the Communications Act of 1934, as amended ("Pole Attachment Act")[1] and Subpart J of the Commission's Rules.[2] Complainant also filed a Petition for Temporary Stay ("Petition"). Respondent filed its Response on July 14, 2000. Along with its Response, Respondent filed a Motion to Dismiss the Complaint for lack of jurisdiction, a Motion for

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[1] 47 U.S.C. § 224.

[2] 47 C.F.R. §§ 1.1401-1.1418.

Confidential Treatment of its financial information and an opposition to Complainant's Petition. Complainant filed its Reply on August 29, 2000, along with its opposition to Respondent's Motion for Confidential Treatment.[3] Our rules require that the parties seek first to resolve their differences by negotiation.[4] Based on our review of the record, we believe that further negotiations between the two parties are likely to be fruitless.[5] In this Order, we deny Respondent's Motion to Dismiss, we grant the Complaint in part, we temporarily grant Respondent's Motion for Confidential Treatment in part and we dismiss the Petition for Stay as moot.

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. The Commission shall provide that such rates, terms and conditions are just and reasonable.[6] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.[7] The

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[3] We granted Complainant an extension of time to file its Reply. *See In the Matter of Alabama Cable Telecommunications Association, et al. v. Alabama Power Company*, File No. PA 00-003, DA 00-1847 (released August 11, 2000). On August 11, 2000, the parties reached an agreement concerning the confidential treatment of information provided to the Complainant by the Respondent, and Complainant was provided with an unredacted copy of the Response. *See* letter dated August 22, 2000 to Kathleen F. Costello, Cable Services Bureau, from Raymond A. Kowalski, counsel for Respondent.

[4] 47 C.F.R. § 1.1404 (1)(1999).

[5] Complaint at ¶ 20.

[6] 47 U.S.C. § 224(b)(1).

[7] 47 U.S.C. § 224(b)(1) and (2). Alabama has not certified that it regulates rates, terms and conditions of pole attachments. *See* Public Notice,

Commission is authorized to adopt procedures necessary to hear and to resolve complaints concerning such rates, terms, and conditions.[8] The formula developed to resolve complaints concerning rates is known as the Cable Formula. The Telecommunications Act of 1996 ("1996 Act"),[9] expanded the scope of Section 224 by applying the pole attachment rate formula to rates for pole attachments made by telecommunications carriers[10] in addition to cable systems,[11] until a separate methodology[12] becomes effective for telecommunications carriers after February 8, 2001.[13] Our current Cable Formula applies to attachments made by cable systems and telecommunications carriers providing telecommunications services until February 8, 2001.[14] A utility must charge a pole attachment rate that does not exceed the maximum amount

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"States That Have Certified That They Regulate Pole Attachments," DA 92- 201, 7 FCC Rcd 1498 (1992).

[8] 47 U.S.C. § 224(b)(1). The Commission has developed a formula methodology to determine the maximum allowable pole attachment rate. *See* Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585 (1978); Second Report and Order, 72 FCC 2d 59 (1979); Memorandum and Order, 77 FCC 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); and Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987). *See also*, Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 (1998) and Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 (2000).

[9] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[10] 47 U.S.C. § 153(44).

[11] 47 U.S.C. § 153(8); 47 U.S.C. § 602(5).

[12] *See* Implementation of Section 703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777 at ¶¶ 116-130 (1998).

[13] *See* 47 U.S.C. § 224(d)(3) and 47 U.S.C. § 224(e)(4).

[14] *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 5 (2000).

permitted by the formula developed by the Commission. We have concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[15]

3. The parties to this Complaint have been engaged in an approximately 20 year relationship, during which time Complainant's attachments to Respondent's poles were governed by agreements which provided for Complainant to pay an annual pole attachment fee to Respondent. For a number of years prior to this Complaint, the parties' have used the Commission's Cable Formula as the basis for negotiating this rate. For the year beginning July 1999 through June 2000, Complainant was charged an annual pole attachment rate of $7.47 per pole.[16] Complainant has not challenged that rate. In June of this year, Respondent announced that it was rescinding all existing agreements and desired Complainant to enter into new agreements, effective September 11, 2000, which are similar to the old agreements except that the annual rate charged is $38.81 instead of $7.47. Complainant responded by filing this Complaint. In order to calculate a reasonable pole attachment rate when the parties to a pole attachment agreement cannot negotiate a reasonable rate, we apply our Cable Formula using public data when available. Both parties submitted pole attachment rate calculations that drew similar conclusions. Complainant even submitted calculations that took into account arguments raised by Respondent, which increased the maximum rate calculation.[17]

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[15] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration, 4 FCC Rcd 468 at ¶ 25 (1989).

[16] *See* Complaint at Exhibit 4.

[17] We decline to address the parties' specific issues relating to the application of the formula because, under any scenario proposed by the

Complainant has agreed to pay an annual pole attachment rate of $7.47, which exceeds the maximum rate either party calculated using the formula prescribed by the Pole Attachment Act, and therefore exceeds Respondent's fully allocated costs associated with the attachment.

4. Respondent does not attempt to justify its $38.81 rate using the Cable Formula. Instead Respondent argues first that we dismiss the Complaint for lack of jurisdiction, based on the recent decision in *Gulf Power, et al. v. FCC*[18] ("*Gulf Power II*"). *Gulf Power II* disposed of consolidated petitions for review of the Commission's Order[19] implementing 47 USC § 224, as amended by the 1996 Act. Further litigation in this matter is in progress and as a consequence, the mandate in the *Gulf Power II* proceeding has not been issued by the Court. Pending the issuance of a mandate from the Court, or a clarification of the *Gulf Power II* decision, we will continue to apply our pole attachment rules to all attachers who are either cable service or telecommunications service providers. Therefore, we will deny Respondent's Motion to Dismiss.

5. Respondent next poses a variety of arguments in support of changing the Cable Formula. All of these arguments have been addressed and rejected in prior Commission Orders. For two decades the Cable Formula has provided a stable and certain regulatory framework, that may be applied simply and expeditiously requiring "a minimum of staff, paperwork and procedures consistent with fair and effic-

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Respondent, Complaint's agreed rate of $7.47 exceeds the fully allocated costs.

[18] *Gulf Power, et al. v. FCC and USA*, 208 F. 3d 1263 (11th Cir., released April 11, 2000).

[19] Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, FCC 98-20, 13 FCC Rcd 6777 (1998).

ient regulation."[20] Congress did not believe that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole, duct and conduit plant were already established and reported to various regulatory bodies, in this case, to the Federal Energy Regulatory Commission ("FERC").[21] Further, the United States Supreme Court has upheld the Cable Formula for calculating pole attachment rates.[22] Respondent bases its arguments on the 1996 Act amendments to the Pole Attachment Act, which imposed upon all utilities, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[23] This directive ensures that "no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields."[24] Because the Court in *Gulf Power, et al. v. FCC*[25] ("*Gulf Power I*"), held that application of the mandatory access provisions of the amended Pole Attachment Act effect a taking of utility property under the Fifth Amendment to the

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[20] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. at 21 (1977) (stating that it was the desire of the drafters "that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation").

[21] *Id.*

[22] *FCC v. Florida Power Corporation*, 480 U.S. 245 *(1987)*; *see also*, *Gulf Power v. USA*, 998 F. Supp. 1386 (N.D. Fla 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999).

[23] 47 U.S.C. § 224(f)(1).

[24] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 at ¶ 1123 (1996).

[25] *Gulf Power, et al. v. USA and FCC*, 187 F.3d 1324 (11th Cir. 1999).

United States Constitution,[26] Respondent proffers that this change in the Pole Attachment Act has changed the nature of its relationship with Complainant from a voluntary relationship to an involuntary relationship. Due to this change, Respondent argues that the pole attachment fee must now satisfy the constitutional requirement of just compensation.

6. The Commission's rules governing pole attachment rates are directly derived from the Pole Attachment Act.[27] Under the Commission's rules, a utility is compensated in full for any make-ready or change-out costs associated with the attachment.[28] Although our rules do not allow a utility to recover twice for these costs,[29] the Cable Formula used to calculate an annual pole attachment rate allows a utility full recovery of its costs associated with the space used for the attachment as well as a return on capital. In order to avoid a prolonged and complex methodology, our policy has been

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[26] U.S. Const., amend V (private property shall not be taken for public use without just compensation).

[27] The Supreme Court found that Congress enacted this legislation "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service." *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). By conferring jurisdiction on the Commission to regulate pole attachments, Congress sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space. *Id.* at 247-48. *See also Alabama Power Co. v. FCC*, 773 F.2d 363, 364 (D.C. Cir. 1985).

[28] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. A pole "change-out" is the replacement of a pole to accommodate additional users.

[29] We have stated on numerous occasions that the attaching entity should not be charged twice for the same costs, once for make-ready costs and again for the same costs if the business expense is reported in the corresponding pole or conduit capital account. *See* Amendment of Rules and Policies Governing Pole Attachments, FCC 00-116, 15 FCC Rcd 6453 at ¶ 7 (2000).

that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from every account used in the Cable Formula. The inclusion of unrelated expenses in certain accounts is balanced by the exclusion of minor expenses that may have a legitimate nexus to pole attachments in other accounts. The continued use of a clear rate formula by the Commission is essential to encourage parties to negotiate for pole attachment rates, terms and conditions and to avoid a prolonged and expensive complaint process. We believe the Cable Formula accomplishes these objectives and provides just compensation to the utility for the space occupied on the pole.

7. We do not believe that an attacher that is already attached to a utility's poles needs to file a complaint for access under the Commission's rules. However, to avoid any confusion, we will order Respondent to allow the Complainant to continue to remain attached at the current rate of $7.47, pending the satisfactory negotiation of a new agreement. Because Respondent failed to justify its proposed annual pole attachment rate of $38.81, we find that rate to be unreasonable pursuant to the Pole Attachment Act and the Commission's rules. We will order the parties to negotiate a new agreement in good faith using the Cable Formula as a guide to establishing a reasonable rate. To the extent that Complainant has paid the $38.81 rate, we will order refunds of any charges over the $7.47 amount.

8. Finally, Respondent requests confidential treatment of its commercial and financial information. Because the parties have reached an agreement on the terms of disclosure of this information to the Complainant, it is not essential to a resolution of this Complaint to make a final determination of this issue at this time. We are hard put to find justification for the confidential treatment of public documents but due to the changing nature of utility regulation, we will reserve this issue for further review. In the interim, we will continue to

withhold the requested material from public disclosure. However, we emphasize that it is never appropriate to withhold FERC Form 1 data and other essential data from an attacher, nor is it ever appropriate to require an attaching entity to agree to any curtailment of its statutory right to access this information and to file a complaint along with its analysis of the information with the Commission. We also emphasize the necessity of Respondent filing a complete, unredacted copy of the FERC Form 1 with the Commission. Additionally, because we resolve the Complaint herein, we will dismiss the Petition for Stay as moot.

9. Accordingly, IT IS ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the complaint referenced herein IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent's Motion to Dismiss IS DENIED.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent's Motion for Confidential Treatment is GRANTED IN PART TO THE EXTENT INDICATED HEREIN, pending our further review.

12. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Complainant's Petition for Temporary Stay IS DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent continue to GRANT ACCESS to Complainant on the terms of the

existing agreements pending the negotiation of new agreements and that the pole attachment agreements between Respondent and Complainant ARE MODIFIED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the annual pole attachment rate of $38.81, IS UNREASONABLE and IS TERMINATED.

15. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that the annual pole attachment rate of $7.47 IS CONTINUED, pending further negotiations.

16. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent, SHALL REFUND to Complainant, within thirty (30) days of the release of this Order, that portion of the amount paid in excess of $7.47, plus interest to the date of refund, for the period from June 23, 2000 to the present, plus interest.

17. IT IS FURTHER ORDERED, pursuant to Sections 0.321 and 1.1401-1.1418 of the Commission's rules, 47 C.F.R. §§ 0.321 and 1.1401-1.1418, that Respondent and Complainant SHALL NEGOTIATE IN GOOD FAITH, new pole attachment agreements with a just and reasonable annual pole attachment rate, in accordance with the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Cable Services Bureau

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Jan. 08, 2003]

No. 00-14763-TT

ALABAMA POWER COMPANY
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION,
COMCAST CABLEVISION OF DOTHAN, INC., AMERICAN
ELECTRIC POWER SERVICE CORPORATION
Intervenors.

No. 00-15068-TT

GULF POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA,
Respondents,

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
COMMONWEALTH EDISON COMPANY,
DUKE ENERGY CORPORATION,
Intervenors.

No. 01-13058-TT

ALABAMA POWER COMPANY AND
GULF POWER COMPANY,

Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES

Respondents,

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION, COMCAST CABLEVISION OF DOTHAN, INC., *et al.*, AND AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, *et al.*,

Intervenors

On Petition for Review of a Final Order of
The Federal Communications Commission

BEFORE: TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Petitioner, Alabama Power Company, is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

No. 01-13058-TT

ALABAMA POWER COMPANY AND
GULF POWER COMPANY,
Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES,
Respondents,

ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION
COMCAST CABLEVISION OF DOTHAN, INC., *et al.*,

and

AMERICAN ELECTRIC POWER SERVICE CORPORATION,
COMMONWEALTH EDISON COMPANY, *et al.*,
Intervenors.

On Petition for Review of a Final Order of
The Federal Communications Commission

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th cir., 19__, ____F.2d___).

Before: TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX E

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
PART I—COMMON CARRIER REGULATION

§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminator [1] basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of

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[1] So in original. Probably should be "nondiscriminatory".

such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

Supreme Court, U.S.
FILED
JUL 9 2003
OFFICE OF THE CLERK

(3)

No. 02-1474

IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT INTERVENORS' BRIEF IN OPPOSITION

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July 9, 2003

39 pp

QUESTION PRESENTED

Whether, under 47 U.S.C. § 224, the process for determining and paying the marginal cost of attaching cables to utility poles, plus the portion of the fully allocated cost of the construction and operation of the poles based on the space occupied by the attached cables, meets or exceeds any constitutional requirement that "just compensation" be paid to utility pole owners for mandatory attachments.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, the parties appearing before the United States Court of Appeals for the Eleventh Circuit were as follows: the Alabama Cable Telecommunications Association, Comcast Cablevision of Dothan, Inc., Cox Communications Gulf Coast, L.L.C., and the Florida Cable Telecommunications Association, Inc., intervening in support of the Federal Respondents. American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Gulf Power Company, and PECO Energy Company intervened in support of Petitioner.

This Brief in Opposition is submitted by the Alabama Cable Telecommunications Association and Comcast Cablevision of Alabama, Inc. (the successor to Comcast Cablevision of Dothan, Inc.) ("Respondent Intervenors").

The Alabama Cable Telecommunications Association is the principal trade association of the cable television industry in Alabama. ACTA has no parent corporations or publicly held companies owning 10% or more of its stock whose listing is required by Supreme Court Rule 29.6.

Comcast Cablevision of Dothan, Inc. has been merged into Comcast Cablevision of Alabama, Inc., an Alabama corporation, which is 100% owned by Comcast Cable Communications, Inc., a Delaware corporation, which is 100% owned by Comcast Holdings Corporation, a Pennsylvania corporation, which is 100% owned by Comcast Corporation, a publicly-held Pennsylvania corporation.

In the proceeding below, the Florida Cable Telecommunications Association, Inc. and Cox

Communications Gulf Coast, L.L.C. intervened in a Petition for Review filed by Gulf Power Company (11th Cir Case No. 00-15068-D, filed Sept. 27, 2000). Gulf Power Company's Petition for Review sought review of *Alabama Cable Telecommunications Association, et al. v. Alabama Power Co.*, Order, 15 F.C.C.R. 17346 (2000), the same decision which Petitioner Alabama Power Company, Inc., is seeking further review of here. Gulf Power was neither a party to nor a participant in the proceedings that led to the Order. The court of appeals dismissed Gulf Power Company's Petition for Review for lack of standing, because the utility was not a party to the agency proceeding under review. *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1366-67 (11th Cir. 2002), Petitioner's Appendix ("Pet. App.") at 13a-14a. That dismissal has not been presented by Petitioner to this Court for review.

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No. 02-1474

IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY

Petitioner,

V.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT INTERVENORS' BRIEF IN OPPOSITION

Respondent Intervenors Alabama Cable Telecommunications Association and Comcast Cablevision of Alabama, Inc., ("Cable Respondents") respectfully request that this Court deny the petition for a writ of certiorari requested by Petitioner Alabama Power Company, Inc. ("Petitioner" or "APCO") to review the decision of the United States Court of Appeals for the Eleventh Circuit.

COUNTERSTATEMENT OF THE CASE

This case presents the issue of whether the process by which Respondent Federal Communications Commission ("FCC" or "Commission") determines and calculates pole rental and other payments pursuant to the Pole Attachments Act of 1978, 47 U.S.C. § 224, (the "Act")

provides "just compensation" to utility pole owners that must allow cable operators to attach their facilities to utility poles. The Eleventh Circuit, in affirming a decision of the FCC, properly found that payment of all of the costs incurred by Petitioner for accommodating cable television operators' attachments to Petitioner's poles provides "just compensation." Moreover, as the Eleventh Circuit observed, even though this cost reimbursement alone is constitutionally sufficient, under the terms of the Act and the FCC's regulations, Petitioner receives additional and substantial annual pole rental payments from the cable television operators who have attached to Petitioner's utility poles, thus guaranteeing that the payments to Petitioner well exceed any just compensation owed. Pet. App. 21a.

Petitioner's attack on the Act's formula and the FCC's resolution of pole attachment complaints is yet another chapter in the story of the electric utility industry's efforts over more than two decades to undermine the statutory and regulatory provisions in § 224 that ensure "just and reasonable" "rates, terms, and conditions" for entities such as cable television operators who must attach their facilities to essential, "bottleneck" utility poles. *See National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330-331 (2002) ("*NCTA*"); *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) ("*Florida Power*"). Prior to 1996, cable operators facing unreasonable rates, terms, or conditions for attaching their facilities to utility poles filed complaints at the FCC that were resolved pursuant to the provisions in § 224 and the FCC's implementing regulations. The utilities' constitutional challenge to the FCC's jurisdiction and pole rental formula was rejected because there was no "taking" and the pole rental formula was reasonable. *Florida Power*, 480 U.S. at 254.

Subsequent to the enactment of the Telecommunications Act of 1996, which among other

things added a provision in § 224(f) requiring utility pole owners to grant cable operators and certain telecommunications carriers access to poles, the utilities again challenged the formula and regulations of the FCC as facially unconstitutional for these "new" mandatory attachments. Although the district court found that the mandatory access provisions in § 224(f) caused a "taking," it also found that the process for determining pole rental and other payments under the formulas prescribed in § 224 and FCC regulations (previously upheld in *Florida Power* for "voluntary" attachments) nonetheless satisfied constitutional requirements for paying pole owners "just compensation" for mandatory attachments. *Gulf Power Co. v. United States*, 998 F. Supp. 1386 (N.D. Fla. 1998), *aff'd*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*"). The court of appeals held:

> We have no reason to assume that the rate under the prior version of the Act was only minimally adequate to meet constitutional requirements for voluntary access, and thus, in the [utilities'] view, constitutionally inadequate under the current Act for forced access situations. Indeed, for all we know, it is just as likely that the earlier rate formula gave the utilities industry more than the constitutional minimum.

Gulf Power I, 187 F.3d at 1338.

Undeterred, in June 2000 Petitioner notified Alabama cable operators, whose attachments had been on utility poles for more than 20 years, that it intended to terminate all pole attachment agreements, deem existing attachments to be a "taking" under § 224(f), and require cable operators who wished to maintain their attachments to sign new pole agreements prepared by APCO that increased annual pole rental rates by more than 500 percent, from $7.47 to $38.81 per pole.

This convenient termination of existing attachments did not change the nature or amount of space on the poles occupied by the cable operators' attachments. It only allowed Petitioner to claim that the cable operators' continued presence on the poles was not "voluntary" so it could then argue that the compensation due was not limited to the § 224 formula and this Court's holding in *Florida Power* and instead would be governed by the Fifth Amendment and its (unfounded) hope for more compensation under *Gulf Power I*.[1]

The Alabama cable operators ("Complainants")[2] immediately filed a Pole Attachment Complaint with the Cable Services Bureau ("Bureau") of the FCC seeking a ruling that APCO's termination of existing contracts and unilateral imposition of new, exorbitant pole rates constituted violations of § 224 and the FCC's implementing regulations, 47 C.F.R. §§ 1.1401-1.1418. The Bureau granted the Complaint and rejected APCO's proposed new rate. Pet. App. 87a-96a. The full Commission affirmed the Bureau. Pet. App. 25a-86a. APCO sought review in the Eleventh Circuit, arguing that it was entitled to the rate of $38.81 as "just compensation" for mandatory attachments. In a

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[1] Petitioner was evidently encouraged by the statement in *Florida Power* that this Court was not deciding what the appropriate level of compensation might be for pole attachments "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Florida Power*, 480 U.S. at 251, n.6. Petitioner believes that § 224(f) precipitates that "future case." See Petition at 6.

[2] The principal Complainants were the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc. (now Comcast Cablevision of Alabama, Inc.). In addition, the Florida Cable Telecommunications Association, Inc. and Cox Communications Gulf Coast, L.L.C. filed a separate Pole Attachment Complaint at the Cable Services Bureau against Gulf Power Company, in response to Gulf Power's similar increase in annual pole rental rates by more than 500 percent to $38.06. Pet. App. 14a, n.17.

unanimous decision, the court of appeals denied APCO's petition for review. Pet. App. 1a-24a.

In its petition for certiorari here, APCO reargues that it has been denied "just compensation" by characterizing the decision below as awarding it only "the costs associated with its property being taken" and that its "utility pole space [was rendered] essentially valueless." Petition at 3. Petitioner relies on a recent dissent by Justice Scalia in an attempt to analogize this case to that which divided the Court in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). Petition, 3, 9-10, 12-15, 23, n.6, 24, 27-28. However, the majority and dissenting opinions in *Brown* are both consistent with the Eleventh Circuit's decision below. Moreover, Petitioner here receives the associated costs of attachment *and* rental for space on its poles, putting it in a better position than it was before any of its pole space was "taken" by virtue of § 224, thus giving it considerably more than the minimum required as "just compensation" under the Constitution.

This case, in which Petitioner has engineered a "taking" as a pretext for demanding a more than five-fold increase in annual pole attachment rates under the guise of "just compensation," is simply another aspect of the electric industry's continuing assault on federal regulation of pole attachments.[3] Because there was no

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[3] In *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*") electric utilities sought review of the FCC's revised pole attachment rules and again argued that the cable rate formula established by the FCC under Section 224 for "mandatory" attachments did not provide just compensation. The Eleventh Circuit held that this facial attack on the FCC's regulations was not ripe. *Id.* at 1272. However, the court of appeals also held that the FCC lacked jurisdiction to regulate pole attachments that are used for cable television service commingled with Internet service or that are used for wireless communications. *Id.* at 1273-78. The latter ruling was overturned by this Court in *NCTA*, 534 U.S. at 790. In *Southern Company v. FCC*, 293 F.3d 1338 (11th Cir. 2002), the parent company

error below or inconsistency with any decision of this Court, no conflict among the circuits, or any other basis for review, APCO's Petition should be denied.

I. Utility Poles, Pole Regulation, And The Telecommunications Act Of 1996

A. Utility Poles Are Essential Facilities

In 1978, in response to evidence that utility companies were exploiting their monopoly power over bottleneck facilities needed by cable television systems to deliver their services to consumers, Congress enacted the Pole Attachments Act, 47 U.S.C. § 224 ("Act"). *Florida Power*, 480 U.S. at 247. In the deliberations preceding the Act, Congress observed that "[i]n many communities," "because of the lack of available rights-of-way, environmental restrictions, or zoning laws," cable operators were "unable to construct [their] own pole plant for the attachment of [their] coaxial cable" and instead were required "to use existing utility company poles." H.R. REP. NO. 94-1630, at 5 (1976). Congress further found that "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates." S. REP. NO. 95-580, at 13 (1977). As this Court observed, "utilities ... ha[d] found it convenient to charge monopoly rents." *NCTA*, 534 U.S. at 330. *See also Florida Power*, 480 U.S. at 247 (utilities

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of APCO and Gulf Power argued that FCC guidelines pertaining to non-discriminatory access to poles were invalid. With two exceptions, the Eleventh Circuit upheld the guidelines as reasonable. *Id.* at 1343-53. Then, in *Southern Co. Servs. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002), the utilities attacked FCC rules involving the calculation of the number of entities on a pole, the industry practice of "overlashing" one attachment with another, and the determination of conduit rental rates. With the exception of certain rules for which it held the utilities' challenges to be unripe, the D.C. Circuit upheld all of the FCC rules. *Id.*

were said to be "exploiting their monopoly position by engaging in widespread overcharging."). Thus, the 1978 Act was passed "[t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unreasonable pole attachment practices on the wider development of cable television service to the public." S. REP. NO. 95-580, at 114.

B. Pole Regulation And Pole Attachment Payments

The FCC responded to Congress' mandate by developing an approach which recognizes that utilities receive two forms of compensation for pole attachments: (1) contractual payments by attachers to pole owners for the costs of modifying the poles or lines to accommodate the attachers' additional facilities, known as "make-ready" work; and (2) annual pole attachment rental rates based on the value of the entire pole and the proportional space occupied by the attachers under a formula set forth in § 224 and the Commission's rules.[4]

Utilities recover all of their out-of-pocket, or incremental costs, in the form of make-ready payments directly from cable systems. *In re Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 F.C.C.R. 6453, ¶ 7 (2000) ("*2000 Pole Order*"); *In re Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 F.C.C.R. 4387, ¶ 4 (1987)

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[4] Under Section 224(c), states may "preempt" the FCC's authority where they certify that they regulate pole attachment rates, terms, conditions, or access to poles. Eighteen states and the District of Columbia have provided the required certification.—*See States That Have Certified That They Regulate Pole Attachments*, 7 F.C.C.R. 1498 (1992). These states have for the most part adopted the FCC's methodology when setting pole attachment rates. Alabama (and Florida) have not certified, so rates for pole attachments in those states are set using the federal formula and the FCC's procedures.

("*1987 Pole Order*"), *on recon.*, 4 F.C.C.R. 468 (1989). In fact, APCO, like other electric utilities, contractually requires that attachers pay all of the costs incurred for make-ready work. *See, e.g.*, Complaint, Ex. 3, ¶ 4 (filed June 23, 2000).

Utilities also receive compensation for pole attachments through annual pole rental rates. Section 224 creates a range of compensation, the low end of which is the incremental costs of the utility that would not have been incurred but for the new attachment, and the high end of which is an allocation of the fully-loaded carrying costs of the pole (including return on investment). The parameters for setting the rate for cable television attachments are set forth in 47 U.S.C. § 224(d); the parameters for setting the rates for telecommunications attachments were added in 1996 and are set forth in 47 U.S.C. § 224(e). The FCC has long interpreted the statute to provide that when it is reducing a utility's annual rate for pole attachments, it reduces it to the statutory maximum. *Florida Power*, 480 U.S. at 254.

The FCC allocates annual pole costs to cable operators through a set of presumptions and references to existing utility financial reports filed with the Federal Energy Regulatory Commission ("FERC"). The FCC's formula for cable attachments begins with the annual carrying costs for the *entire* pole—maintenance, depreciation, administrative overhead, taxes, and return on investment at the rate authorized by the applicable State Public Service Commission ("PSC"). Each cost input is taken directly from each utility's specific, publicly-reported cost information (FERC Form 1). Although the FCC publishes a schedule of the FERC accounts that are presumptively included in the cost calculation, *1987 Pole Order*, 2 F.C.C.R. at 4404, the FCC actually tailors the cost calculation to individual showings by utilities.

These costs for the whole pole are then allocated by the amount of space used by cable operators. The

formula uses presumptions, for a population of 35- and 40-foot poles, that 13.5 feet of space above minimum grade clearance is "usable" and cable attachments "use" one foot of that space. 47 C.F.R. § 1.1418. Thus, a cable attachment is assigned 1/13.5 of the annual carrying costs of the entire pole. This presumption is explicitly rebuttable. 47 C.F.R. § 1.1404(g)(1)(xi). Utilities can and do submit their actual plant records so that a utility with shorter poles (and therefore less usable space) can assign proportionately more cost to each foot of usable space.

The FCC developed this approach through a series of rulemakings and adjudicated cases. *See, e.g., In re Adoption of Rules for the Regulation of Cable Television Pole Attachments,* Notice of Proposed Rulemaking, 68 F.C.C.2d 3 (1978) ("*1978 Notice of Proposed Rulemaking*"); First Report and Order, 68 F.C.C.2d 1585 (1978) ("*First Report*"); Memorandum Opinion and Second Report and Order, 72 F.C.C.2d 59 (1979) ("*Second Report*"); Memorandum Opinion and Order, 77 F.C.C.2d 187 (1980) ("*Reconsideration*"); *Petition to Adopt Rules Concerning Usable Space on Utility Poles,* Memorandum Opinion and Order, 56 R.R.2d 707 (F.C.C. 1984). The Commission's orders promulgating its rules and policies were upheld on appeal. *See Monongahela Power Co. v. FCC,* 655 F.2d 1254 (D.C. Cir. 1981). The FCC has reconsidered and adjusted the cost accounting, *1987 Pole Order,* and recently conducted a rulemaking that led to a decision reaffirming the propriety of the annual cable attachment rental methodology, including the use of particular cost accounts and the applicability of established presumptions. *See 2000 Pole Order; see also In re Amendment of Rules and Policies Governing Pole Attachments,* Consolidated Partial Order On Reconsideration, 16 F.C.C.R. 12103 (2001).

C. The Telecommunications Act Of 1996

In the Telecommunications Act of 1996 ("1996 Act"),[5] Congress sought to promote competition while simultaneously guarding against utilities' abuse of their monopoly control over poles. Congress expanded the 1978 Act to include *all* competitive cable and telecommunications carriers and granted them a right of pole access upon payment of just and reasonable compensation.[6] In the 1996 Act, Congress also amended federal law to allow interstate electric utilities into the field of telecommunications under rules ensuring fair competition, Pub. L. No. 104-104, § 103, and required them to provide non-discriminatory access to poles and other rights-of-way. See 47 U.S.C. § 224(f). Utility adherence to the rules ensuring fair competition was the "quid pro quo" for allowing the utilities into communications businesses that had been previously forbidden. Pub. L. No. 104-104, § 103 (amending the Public Utility Holding Company Act, 15 U.S.C. § 79); *see also* Pet. App. 8a ("Perhaps fearing that electricity companies would now have a perverse incentive to deny potential rivals the pole attachments they need, Congress made access mandatory") (citation omitted).

Taking advantage of their new freedom, the utilities have created subsidiaries and affiliates that lease fiber-optic lines, provide communications services, and offer Internet and long distance services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 F.C.C.R. 4358, ¶¶ 4, 10, 95-98 (1997). Petitioner's parent company, the

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[5] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[6] *Id.*, Sections 224(f), 251(b)(4) (codified at 47 U.S.C. §§ 224(f), 251(b)(4)). Incumbent local exchange carriers (phone companies) also own poles and are subject to the FCC's pole attachment regulations when they lease space to cable operators or telecommunications carriers, but cannot demand access themselves when renting space from other utilities. 47 U.S.C. § 224(a)(5).

Southern Company, now provides telecommunications and other services through various subsidiaries. *In re Application of Southern Telecom Holding Co., et al.*, DA 96-952, FCC File Nos. ETC-96-8; ETC 96-9; ETC-96-10 (June 14, 1996).[7]

II. The Decisions Of The Bureau And The Commission

After considering the cable operators' pole attachment Complaint, APCO's Response, and the cable operators' Reply, the Bureau issued an Order on September 8, 2000 granting the Complaint. *In re Alabama Cable Telecommunications Ass'n., et al. v. Alabama Power Co.*, Order, 15 F.C.C.R. 17346 (2000) ("*Bureau Order*"), Pet. App. 87a-96a. The Bureau rejected APCO's contention that the cable formula did not provide just compensation, finding instead that APCO was fully compensated for any make-ready or change-out costs associated with the attachments and that the annual pole attachment rate allowed it a full recovery of the costs associated with the space used for the attachment as well as a return on capital. Pet. App. 93a-94a. APCO immediately filed an Application for Review with the full Commission.[8]

On May 25, 2001, the Commission denied APCO's Application for Review. *In re Alabama Cable Telecommunications Ass'n., et al. v. Alabama Power Co.*,

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[7] *See also* http://www.southern-telecom.com (last visited July 2, 2003); *see generally* John Markoff & Matt Richtel, *Technology; Internet Via The Power Grid: New Interest In Obvious Idea*, N.Y. Times, Apr. 10, 2003, at C7, *available at* http://www.nytimes.com/2003 /04/10 /technology/10POWE.html (describing effort to provide Internet services via the power grid).

[8] APCO actually filed its Petition for Review in the Eleventh Circuit while its Application for Review was pending before the full Commission. The court of appeals noted that the Petition was "incurably premature" and dismissed it, but resolved the consolidated Petition that APCO filed after the full Commission released its order affirming the Bureau. Pet. App. 13a-14a.

Order, 16 F.C.C.R. 12209 (2001) ("*Order*"). The Commission found that its pole attachment regulations provided constitutionally sufficient compensation because they enabled APCO, a utility, "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed . . . ." Pet. App. 62a (citations omitted). Second, the Commission ruled that APCO had not provided credible evidence that the payment of make-ready and annual rents under the cable formula failed to place APCO in the same position monetarily as it would have been but for the cable operators' attachments. Pet. App. 72a-73a. "The Commission's cable rate formula, together with the payment of make-ready expenses, provides compensation that exceeds just compensation." Pet. App. 72a.

III. The Court Of Appeals' Decision

The Eleventh Circuit dismissed APCO's Petition for Review of the Commission's *Order*. Pet. App. 1a-24a. The court agreed with the Commission's application of the established legal principle that just compensation is measured by the loss to the owner and held that, because FCC regulations provide for owners to be paid both their marginal costs through make-ready payments as well as their fully allocated costs through annual pole rents, APCO received more than just compensation. Pet. App. 21a. If, and only if, APCO had made a factual showing (which it never attempted) that its poles were "full" would APCO be in a position to demand something more than marginal cost. *Id.*[9] On January 8, 2003, the court of appeals denied APCO's petition for rehearing and suggestion for rehearing en banc. Pet. App. 98a-99a.

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[9] APCO has disclaimed any interest in making such proof, deeming the court of appeals' holding on this issue "abstract." Petition, 25.

REASONS FOR DENYING CERTIORARI

Petitioner's principal argument for the granting of certiorari—that the court of appeals "depart[ed] from this court's well-defined body of takings law"—is unfounded. Petition, 12. It is based upon the incorrect application of the concept of "market value" to monopoly-controlled utility poles; a mischaracterization of the decision below as having "invented" a "zero value" standard for compensation; and inapposite comparisons to takings decisions of this Court involving real property. In fact, the court of appeals, like the FCC, correctly applied the fundamental rule of determining just compensation—that compensation due is measured by the loss to the owner, not the gain to the "taker." Pet. App. 17a-18a. As will be shown below, there was no error committed by the FCC or the Eleventh Circuit; there are no conflicts with decisions of this court or among the circuits; and there is no harm to the electric utilities from the decision being challenged because they can recover all of their costs and even earn a profit—thus being placed in a position that is better than what the Constitution requires.[10] Certainly, nothing in the Petition justifies any further review of Petitioner's claims.

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[10] *Amici Curiae* United Telecom Council, *et al.*, suggest that the Court should grant the Petition to decide issues not relevant to the Petitioner's claims, such as pole attachment rates for non-distribution utility property (transmission poles) and wireless attachments. *Amici Curiae* Br. 4-6. However, most transmission poles have been excluded from the mandatory attachment provisions. *Southern Co. v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002). *Amici* also argue that there will be "nationwide irreparable harm," *Amici Curiae* Br. 17-19, as a result of the decision below even though the utilities recover all their costs and earn a profit on all pole attachments, and have been earning these same rates and profits on voluntary attachments for 25 years with no apparent adverse effect. *Amici*'s pleas do not warrant review.

I. Just Compensation Is Measured By The Loss To The Property Owner

More than 100 years ago, this Court established that the constitutional measure of just compensation is the loss to the person whose property is taken. *Bauman v. Ross*, 167 U.S. 548, 574 (1897). *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987); *United States v. Causby*, 328 U.S. 256, 261 (1946); Pet. App. 17a-18a. Petitioner never even mentions this principle—let alone addresses it—in its Petition. Instead, Petitioner invokes the talismanic phrase "market value" as purported justification for its five-fold annual pole rent increase. But "market value" does not apply in circumstances where there is no "market." Instead, the general, governing standard for determining just compensation is "loss to the owner." *United States v. John J. Felin & Co.*, 334 U.S. 624, 641 (1948).

The Constitution does not prescribe a fixed method for the calculation of just compensation and the Court "has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases." *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). Instead, there are several approaches that may be applied. Frequently, the courts will determine just compensation by looking to "fair market value." This denotes "what 'it fairly may be believed that a purchaser in fair market conditions would have given'" for the property at issue. *United States v. Miller*, 317 U.S. 369, 374 (1942) (internal citation omitted). However, "[w]here, for any reason, property has no market, resort must be had to other data to ascertain its value ...." *Id.*

A second approach to calculating just compensation involves assessing the income that an asset is expected to produce. This approach is based on the concept that a prospective buyer "will be willing to pay a price for an

asset that reflects a present value of the future benefits (*i.e.*, income) that the buyer can realize from the asset." JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN, § 14A.06[3][b] (3rd ed. 1998) ("NICHOLS"). The third approach that may be appropriate to determine just compensation is an evaluation of the costs of the property at issue. NICHOLS, § 14.06[2]. Which of the three approaches is appropriate to use in a particular case will depend "upon the circumstances of each case." *Miller*, 317 U.S. at 373-74. Thus, the concept of "market value" does not necessarily apply in all instances, and, in any particular case, the approach selected to calculate just compensation in the event of a taking should focus only on putting the owner in "as good position pecuniarily as he would have occupied if his property had not been taken." *Id.* at 373.

II. Petitioner Receives More Than Just Compensation By Virtue Of Make-Ready Payments And An Annual Pole Rent

APCO is compensated for the "loss" associated with allowing cable operators to attach facilities to its poles in two ways: "make-ready" payments and annual pole rents. Petitioner contends here that make-ready is irrelevant to a determination of just compensation for attachers' use of its utility poles. Petition, 23-24. APCO alleges that make-ready represents "nothing more than reimbursement for the actual expenditures incurred by" it. Petition, 23-24. However, just compensation requires that a property owner be "put in as good position pecuniarily as he would have occupied if his property had not been taken." *Miller*, 317 U.S. at 373. Make-ready payments meet this requirement directly by compensating pole owners for all of the actual costs caused by an attachment. In this case, the record establishes, and the court of appeals properly observed, that Alabama's cable operators pay APCO make-ready

payments of more than $1 million *per year.* APCO Response, Tab 1, Item 13 (filed July 14, 2000).

Petitioner also contends that make-ready payments do not compensate it for the "value of the space" occupied by an attachment. Petition, 24. But APCO has never even attempted to show that it experienced any "loss" from cable operators' use of one foot of pole space for their attachments beyond make-ready costs. Pet. App. 19a-21a. Indeed, cable operators' attachments do not deny APCO, or other attaching parties, the use of the pole. Cable operators attach their wires only to space that is not being used. If existing communications space is insufficient or limited, cable operators pay the cost of make-ready or pole "change-out" to cover the costs of strengthening existing poles or substituting larger poles. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 F.C.C.R. 18049 at ¶21 and n.50 (1999).

In any event, Petitioner is wrong. It is compensated for the "value" of the space occupied. Petitioner actually receives, *in addition to* make-ready, an annual pole rental for cable attachments that is determined by multiplying the percentage of the total usable space that is occupied by the attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. 47 U.S.C. § 224(d)(1). This annual rental then provides APCO a portion of the fully allocated cost of the construction and operation of the pole to which cable is attached based on the space used. Pet. App. 6a, n.7 (citing *Florida Power*, 480 U.S. at 253). Significantly, these "fully allocated costs" include components for the utility's administrative, maintenance, depreciation expenses, income taxes, *and* a return on investment (profit). *See* 16 F.C.C.R. 12103 at ¶ 28 (2001). The substantial amount of compensation APCO receives through both make-ready *and* annual rent

thus entirely vitiates its claim, Petition, 3, 13, that the court of appeals adopted or "invented" a "zero value" standard for just compensation. [11]

In evaluating whether the payment to Petitioner of this combination of make-ready payments and the annual pole rental satisfies the requirement of just compensation, the court of appeals properly considered first the nature of the utility's property. Pet. App. 3a-4a; *Miller*, 317 U.S. at 373-74. Utility poles are highly regulated, monopoly-controlled, essential facilities. Pet. App. 3a-4a, 69a-70a; *NCTA*, 534 U.S. at 340 (poles are "bottleneck facilit[ies]" for which utilities have "found it convenient to charge monopoly [pole] rents."); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) (cable operators have "little choice but to" attach to utility poles). [12]

Then the court of appeals correctly examined the nature of the property interest being "taken"—space on a utility pole—to determine what "loss" to the pole owner, if any, an attaching party caused. Pet. App. 17a-18a. A cable operator's use of a portion of a utility pole does not "foreclose any other use" of the pole. Pet. App. 19a.[13] APCO's monetary "loss" for purposes of determining the

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[11] In addition to the more than $1 million in annual make-ready payments paid to Petitioner in 1999, APCO Response, Tab 1, Item 13 (filed July 14, 2000), Alabama cable operators paid Petitioner an annual aggregate pole rental of more than $2.3 million (310,443 poles x $7.47 annual rental rate). *See* Cable Operator Complainants' Second Supplement, Ex. 2 (filed Sept. 6, 2000); Complaint, Ex. 4 (filed June 23, 2000). These additional payments could hardly be characterized as representing a "zero value."

[12] Notably, the decisions relied upon by APCO, *see* Petition, 12-13, all involve real estate or other liquid assets such as cash, not partial interests in regulated, "bottleneck" facilities.

[13] The court of appeals used the term "nonrivalrous" to explain that, because of the "unique" nature of fractional space on a utility pole, the "use by one entity does not necessarily diminish the use and enjoyment of others." Pet. App. 18a-19a.

level of just compensation required by the Constitution, is therefore limited to its actual incremental, or marginal, costs; Petitioner receives "much more than" this amount through the combination of make-ready and annual payments pursuant to the FCC's cable rate formula. Pet. App. 18a.

Petitioner's basic challenge to these time-honored concepts is that its poles should be analogized to privately owned real estate and that it is entitled to charge an annual rent based upon what *it* deems fair "market" value to be. Petition, 12-13, 17-18.[14] Fundamentally, this amounts to a claim that attaching parties pay rates based upon the savings that attaching parties obtain by not having to reproduce, or build anew, a second *system* of utility poles. *See* Petition, 12, 17. Such a measure, whether labeled monopoly rent, "retention" value, or "hold-up" value, is inconsistent with the bedrock principle of measuring just compensation by loss to the owner. In *Commodities Trading Corp.*, 339 U.S. at 123-28, the Court held that "fair and equitable" ceiling prices set by the government in wartime were the measure of just compensation for requisitioned pepper without any regard to higher peacetime "market" value if the requisitioned pepper could have been held and sold later to private parties. In *Lord Mfg. Co. v. United States*, 114 Ct. Cl. 199, 269 (1949), *cert. denied*, 339 U.S. 956 (1950) the Court of Claims held that the "list price" for which the plaintiff's engine mountings could have been sold was not the measure of "just compensation" for the forced sale of those mountings to the government.

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[14] Petitioner argued to the FCC that its five-fold increase in pole rent to $38.81 per pole was justified under three methodologies: market comparisons, income capitalization, or replacement costs. Pet. App. 69a-71a. The FCC soundly rejected these arguments as did the court of appeals, finding the application of such methodologies to be inconsistent with the legal principle that just compensation is determined by the loss to the owner. Pet. App. 68a-73a; 15a, n.19, and 16a-17a. Petitioner has largely abandoned those arguments here.

These concepts carried forward to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the decision upon which the earlier *Gulf Power I* courts relied for the conclusion that the mandatory access provisions in § 224 constituted a taking of property. In *Loretto*, there was never any consideration that some sort of "value to the taker" standard applied to require a higher rate of compensation than was set by New York's mandatory access law (the rate prescribed was $1). This Court noted that any pre-existing indication of "market value" measured by the voluntary payment Teleprompter made to Ms. Loretto before the advent of the mandatory access law that was substantially in excess of the statutory presumptive payment was *not* evidence of what "just compensation" would be for a taking. *Loretto*, 458 U.S. at 441. Instead, the Court left it to the New York courts to decide the issue. *Id.*[15]

In addition, this Court has repeatedly stated that "market value" is not an appropriate method for calculating just compensation "'when market value has been too difficult to find, or when its application would result in manifest injustice to the owner or public.'" *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (quoting *Commodities Trading*, 339 U.S. at 123, *Kirby Forest Inds., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984)). The court of appeals' finding that there is no "active, unregulated market for the use of 'elevated communications corridors...,'" Pet. App. 16a, is consistent with both Petitioner's own concession below that there is no unregulated market for poles, *see* APCO

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[15] Indeed, a level of compensation based on the amount of prior payments or the "market" value to the cable company of placing its facilities over Jean Loretto's roof was never accepted by any court. *See, e.g., Loretto v. Group W. Cable*, 135 A.D.2d 444, 448, (N.Y. App. Div. 1987) (likely award of one dollar), *appeal denied*, 522 N.E.2d 1066 (N.Y. 1988) (Table), *cert. denied*, 488 U.S. 827 (1988).

Reply Brief, 23-24 (filed May 18, 2001), and with this Court's recent conclusion that utility poles are "bottleneck facilities" subject to the "monopoly" control of their owners. *NCTA*, 534 U.S. at 330, 340.

The court of appeals' decision is also supported by *Metropolitan Transportation Authority v. Interstate Commerce Comm'n*, 792 F.2d 287 (2d Cir. 1986) ("MTA"). In MTA, a case involving the government's requiring one regulated entity to share its facilities with another regulated entity, the Second Circuit reasoned:

> [A]ssuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but for the taking. * * * In other words, the owner, here the lessee, of the railroad facilities will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation. * * * If the Fifth Amendment required such a sharing of the overhead costs of ownership, then the petitioners would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation it is that value to the taker is not to be considered; only loss to the owner is to be valued.

Id. at 296-98. In its Petition, 15, APCO argues that MTA's discussion of the issues is inapposite, but in fact the Second Circuit's reasoning is directly relevant—it considers the appropriate measure of just compensation for the physical use by one party of another party's regulated property. By comparison to MTA, the pole attachment payments here ensure that APCO actually

does receive a proportionate share of its overhead (and all its other costs). Pet. App. 63a-64a. Because APCO receives both its marginal costs of an attachment through make-ready payments as well as the proportionate share of its operating costs attributable to an attachment through annual rental payments, Petitioner receives more than just compensation for pole attachments. Pet. App. 17a, 21a.

Petitioner's reliance upon the dissent in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003), Petition, 9-13, is misplaced. In *Brown*, the Court held that because the net pecuniary loss to owners of monies deposited in lawyers' trust accounts was zero, the Washington state law did not violate the Fifth Amendment. *Id.* at 1419-21. The dissenters reasoned that the Washington law violated the Fifth Amendment and that compensation equivalent to accrued interest was owed to the monies' owners. *Id.* at 1422-28 (Scalia, Kennedy, JJ., dissenting). The dissenters, like the majority in *Brown*, adhered to the basic principle that just compensation is measured by an owner's loss. *Id.* at 1427 (Scalia, J., dissenting). The dissenters would have held that the owners' of monies were entitled to receive the actual interest their funds earned. But, in the case of pole attachments, the FCC regulations ensure that the pole owner, Petitioner, receives its actual costs attributable to an attachment, both out-of-pocket costs and ongoing annual costs, *plus* an allocation for cost of capital, or profit. Pet. App. 63a-64a. Therefore, even under the dissent in *Brown*—which acknowledged that a "market value" standard is not to be applied when it is "too difficult to ascertain" or when it would result in "manifest injustice" to the owner or the public—there is no basis for further review of the decision below. *Brown*, 123 S. Ct. at 1423 (citation omitted).

In its Petition, APCO nonetheless argues that the court of appeals' decision was erroneous because it did

not consider the "constitutional significan[ce]" of the FCC's rate for telecommunications pole attachments, or "Telecom Rate," Petition, 15-16; it did not recognize that APCO's pole space for communications attachments is "finite" and "crowded," Petition, 24-25; and it ignored the "reality" that APCO has "lost opportunities," Petition, 25-27. None of these arguments has merit.

First, the potential difference between the rate for cable television attachments and the rate for telecommunications attachments has no constitutional significance because, under FCC regulations and utility contract practices, the pole owner is paid all of its marginal costs through make-ready, in addition to the particular annual pole rental fees. As the court of appeals explained, because payment of marginal cost provides just compensation to pole owners for the use of pole space absent a specific factual showing of the loss of a higher valued use, it is "irrelevant" for constitutional purposes that the formula set forth in 47 U.S.C. § 224(e) may yield a higher rate for telecommunications attachments than the formula set forth in 47 U.S.C. § 224(d) for cable attachments. Pet. App. 21a. Moreover, because a new attacher will pay the make-ready costs of adding its attachment to poles, and create additional space through the change-out of larger poles if necessary, Pet. App. 71a-73a, Petitioner's suggestion that it may be deprived of the opportunity to charge other attachers a higher rate for telecommunications attachments, Petition, 16, is without basis.

Second, Petitioner's argument that space on its utility poles is "finite and indeed crowded," Petition, 25, is unsupported by the record. Petitioner alleges that, on average, its poles will support only one cable or non-incumbent telecommunications attachment. Petition, 24. But, this allegation was devoid of any support in the

record.[16] In fact, the record shows that, on a typical 40-foot utility pole, there is more space available than APCO claims in its Petition. *Compare* Pet. App. 74a (discussing APCO's failure to rebut the presumption that a 40-foot pole has 13.5 feet of usable space) *with* Petition, 24 (alleging only 10.5 feet of usable space). Moreover, even if Petitioner could have established that certain of its poles have a finite amount of space, the industry practice, as noted above, is for a new attacher to create additional space through the make-ready process.

Third, Petitioner's arguments that it has constitutionally cognizable "lost opportunities" are also without foundation. As discussed earlier, because there is no "market" for Petitioner's "bottleneck facilities," Petitioner's contention that the FCC's pole rates wrongfully deprive it of a purported constitutional right to charge "market" rates is a non-starter. This is merely a demand to charge monopoly rents, something this Court and others have held is not required by the Fifth Amendment. *See Commodities Trading*, 399 U.S. at 128; *Lord Manufacturing*, 114 Ct. Cl. at 269. Petitioner's claimed right to sell pole space "at an unregulated rate to a non-cable or non-telecom business," Petition, 26, was never made, let alone proven, in the record below.

Finally, APCO's argument that it has lost the opportunity to deny all third party attachments and only allow its own affiliated providers to attach has nothing to do with determining what level of compensation is just.

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[16] The court of appeals observed that, if APCO could show that its utility poles were at capacity and that another entity was prepared to pay APCO compensation exceeding that required of Cable Operators under FCC regulations, APCO might be able to claim a constitutional right to greater compensation. Pet. App. 20a-21a. However, "nowhere in the record did APCO allege that APCO's network of poles is currently crowded." Pet. App. 20a. Because Petitioner did not even allege such facts, let alone provide proof of such a lost opportunity, it "had no claim" for any additional compensation beyond reimbursement for its marginal costs. Pet. App. 20a-21a.

Rather, it is an example of the leveraging of monopoly control by pole owners that motivated Congress to expand Section 224 to cover telecommunications services providers. *See* 47 U.S.C. § 224(e); CONF. REP. S. 652, 142 CONG. REC. H. 1078, at *H 1133-34 (Jan. 31, 1996).

III. The FCC's Procedures For Determining Compensation For Pole Attachments Are Constitutional

Petitioner also challenges the procedural fairness of both the FCC's and the court of appeals' review of its just compensation claim. Petition, 18-20. First, Petitioner argues that, under *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), Congress impermissibly created a taking under Section 224(f) and wrongfully specified how the Commission could calculate the pole owner's just compensation under Section 224(d). Second, Petitioner attacks the court of appeals' conclusion that APCO's challenge to the FCC's methodology did not warrant an evidentiary hearing. As demonstrated below, these arguments are without merit.

Petitioner's contention that the FCC may not initially evaluate its just compensation claim is incorrect. In a prior case brought by Petitioner's affiliate, Gulf Power, the court of appeals found that Section 224 and the governing provisions for judicial review provide a reasonable, adequate, and certain process for paying just compensation retroactively to the time of any taking attributable to a pole attachment. *Gulf Power I*, 187 F.3d at 1337. In particular, the court of appeals in *Gulf Power I* determined that an executive agency may make an initial determination of just compensation so long as there is a right of judicial review. *Id.*; *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Dow*, 357 U.S. 17, 21 (1958); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923); *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890); *Wisconsin Central Ltd. v. Public*

Service Comm'n, 95 F.3d 1359 (7th Cir. 1996). The fact that Congress established the general terms for a formula for providing for cost reimbursement and a rental payment does not deprive a reviewing court of its constitutional power to review an administrative order setting a just compensation payment.[17]

The court of appeals in *Gulf Power I* found that the FCC's initial determination does not render the process constitutionally inadequate because "an appellate court has at least five means at its disposal to gather the information needed to determine just compensation, and those means are sufficient to provide a utility with a full and fair opportunity to submit for judicial consideration all relevant evidence ...." *Gulf Power I*, 187 F.3d at 1334. The court of appeals specified that the reviewing court may: (1) rely on the evidence submitted in the record before the Commission; (2) remand and direct the Commission to supplement the record if it finds that the record before the Commission is inadequate; (3) transfer the case to a district court and direct it to hold a full hearing pursuant to 28 U.S.C. § 2347(b)(3); (4) appoint a special master under F.R.A.P. 48 to hold a hearing and obtain additional information necessary for the court to

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[17] Indeed, this Court previously addressed and rejected the very argument raised by Petitioner on this point, explaining that:

> The claim is also made that ... the legislature cannot specify the form of compensation but must leave the decision to the judiciary. This argument is based upon an erroneous reading of *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893). *Monongahela* held only that the legislature could not, by setting either a fixed amount to be paid for property condemned or a principle for arriving at that amount, settle the constitutional right to just compensation. Thus, *Monongahela* did no more than restate the general principle that the courts, not the legislature, are ultimately entrusted with assuring compliance with constitutional commands.

Regional Rail Reorganization Act Cases, 419 U.S. 102, 151 n.39 (1974).

determine the just compensation issue; or (5) devise other proper "mode[s] of procedure" vital to achieve its fact-finding pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651. *Id.* at 1334-35 (citations and internal quotations omitted) (footnote omitted). Significantly, Petitioner never asked the court of appeals to do any of the enumerated items above nor did any utility ask this Court to review the propriety of *Gulf Power I's* conclusions.

APCO's second procedural argument—that it was wrongly deprived of due process, including a "full hearing" on its claim for just compensation—is also unfounded. Petition, 19-20. APCO cannot credibly claim that it has been denied the due process elements of notice and an opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 54[illegible] (1985) (stating that "the opportunity to present reasons, either in person *or in writing* why proposed action should not be taken is a fundamental due process requirement") (emphasis added). This Court has also recognized that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances;" rather "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard, . . . to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge,* 424 U.S. 319, 348-49 (1976) (quoting *Goldberg v. Kelly,* 397 U.S. 254, 268-69 (1970) (footnote omitted)).[18]

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[18] The authorities relied upon by Petitioner are inapposite. *Walker v. Hutchinson,* 352 U.S. 112 (1956), addressed the narrow issue of sufficient notice effected by newspaper publication pursuant to statute. *Bailey v. Anderson,* 326 U.S. 203 (1945), required only that the owner have an opportunity to be heard and to offer evidence concerning the property's value. In *Bragg v. Weaver,* 251 U.S. 57, 59

The FCC's rules governing pole attachment complaint proceedings comport with the due process requirements of the Fifth Amendment by providing parties with notice and the opportunity to be heard through a specific pleading process with the opportunity to submit evidence, declarations, expert reports and statistical data. *See* 47 C.F.R. §§ 1.16, 1.363, 1.1401-1.1418. These procedures implement Congress's mandate to provide an expeditious resolution to proceedings involving pole attachment complaints.[19] The Commission's pole attachment regulations are also flexible, and the FCC "may decide each complaint upon the filings and information before it ... or *may, in its discretion*, order evidentiary procedures upon any issues it finds to have been raised by the filings." 47 C.F.R. § 1.1411 (emphasis added).[20] Moreover, an administrative litigant is not automatically entitled to a hearing; rather the litigant must properly articulate a valid legal theory and adduce sufficient facts that warrant such a hearing. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956) (noting that broadcast applicants seeking a waiver from a limitation on a station ownership under 47 U.S.C. § 309 must "state a valid basis for a hearing.").

In this case, APCO's dispute was "only over the *methodology* that should be used to calculate the level of

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(1919), this Court explained that having a full trial was merely one of "several admissible modes" of determining just compensation.

[19] 47 U.S.C. § 224(b)(1); 47 C.F.R. §§ 1.1404-1.1418; *see also* Pet. App. 91a-92a. In enacting the Pole Attachments Act, Congress expressly stated its intention to avoid a lengthy, full-blown rate case for each dispute. S. REP. NO. 95-580, at 19-20 (1977), *Florida Power*, 480 U.S. at 247-48; *In re Amendment of Rules and Policies Governing Pole Attachments*, 16 F.C.C.R. 12103, ¶¶ 7-8 (2001).

[20] This Court has affirmed the propriety of deference to an agency's establishment of internal procedural regulations, as long as those regulations comport with due process obligations. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).

just compensation—a legal issue that hardly warrants an evidentiary hearing since no material facts are disputed." Pet. App. 24a (emphasis in original; citations omitted). Accordingly, APCO's due process challenge to the FCC's pole attachment complaint procedures is entirely without merit. *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-1474

In the Supreme Court of the United States

ALABAMA POWER COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Pole Attachments Act, 47 U.S.C. 224, requires utilities to allow nondiscriminatory access by cable television systems to utility poles. The Act establishes a maximum rental rate that a utility may charge cable television systems for access. As applied by the FCC, that rate assures the utility not less than the additional costs caused by the cable television pole attachments plus a share of the full costs of the pole proportional to the usable space on the pole taken up by the cable television pole attachments. The question presented is whether that rate satisfies the Fifth Amendment requirement for just compensation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 311 F.3d 1357. The order of the Federal Communications Commission (Pet. App. 25a-86a) is reported at 16 F.C.C.R. 12,209.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2002. A petition for rehearing was denied on January 8, 2003 (Pet. App. 98a-99a). The petition for a writ of certiorari was filed on April 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents." *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 330 (2002). To address that problem, Congress in 1978 enacted the Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (47 U.S.C. 224). See generally *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987); S. Rep. No. 580, 95th Cong., 1st Sess. (1977).

The 1978 Act did not compel utilities to allow cable attachments by cable television systems. The Act did, however, authorize the FCC to regulate the rates, terms, and conditions for such attachments to ensure that they are "just and reasonable." 47 U.S.C. 224(b)(1). Then, as now, the Act provided that

> a rate [for an attachment by a cable television system] is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. 224(d)(1). Thus, the minimum rate the FCC could allow is the utility's incremental or avoidable costs—i.e., reimbursement for expenses the utility

would not have incurred but for the cable attachment. The maximum rate is the fully allocated cost of the attachment—i.e., a share of the capital and operating costs of the utility pole, conduit, or right-of-way proportionate to the amount of useable space occupied by the cable attachment. See S. Rep. No. 95-580, *supra*, at 19, 27. See also *Florida Power*, 480 U.S. at 254; Pet. App. 6a ("[T]he FCC promulgated regulations that focused on the *upper end* of this range.") (emphasis added). "A utility must charge a pole attachment rate that does not exceed the maximum amount permitted by the Cable Formula." Pet. App. 27a.

In *Florida Power* in 1987, this Court held that the Pole Attachments Act as originally enacted does not effect an unconstitutional taking of property without just compensation. The Court held that there was no taking because the Act "authorizes the FCC * * * to review the rents charged by public utility landlords who have *voluntarily* entered into leases with cable company tenants renting space on utility poles." 480 U.S. at 251-252 (emphasis added). The Court also held that the rates set under the Act are not confiscatory, and they therefore satisfy the constitutional standards for rate regulation. *Id.* at 253-254.

2. The Pole Attachments Act was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which comprehensively revised the structure of regulation for the entire communications industry. Among the changes made by the Telecommunications Act was the addition of a new "non-discriminatory access" provision. That provision requires any utility that chooses to use its poles, ducts, conduits, or rights-of-way at least in part for wire communications to "provide a cable television system or any telecommunications carrier with non-discriminatory

access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. 224(f)(1). Utilities that do not choose to use their poles for wire communications are thus not obligated by the Act to provide access, although they may voluntarily decide to do so. The amendment also authorizes an additional exception; a utility may deny access "on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. 224(f)(2).

The 1996 amendments also expanded the FCC's rate jurisdiction to include attachments to poles and conduits by "providers of telecommunications service," as well as cable television systems. See 47 U.S.C. 224(a)(4). The regulated rate for pole attachments by telecommunications providers is somewhat different from the rate applicable to attachments by cable television systems. 47 U.S.C. 224(e). The rate for telecommunications attachments "is similar to the cable attachment rate with the sole exception being" that "the telecommunications pole attachment rate allocates the cost of the unusable portion of the pole to an attacher based on the total number of attaching entities rather than on the portion of usable space occupied by the attachment." Pet. App. 64a. The telecommunications rate is ordinarily higher than the cable rate, although the telecommunications rate is lower than the cable rate if there are a large number of attachers to a given pole.

3. Petitioner Alabama Power Company and several other utilities brought suit against the United States and the Federal Communications Commission seeking a declaration that the nondiscriminatory access provision of the 1996 amendments, 47 U.S.C. 224(f), is facially

unconstitutional.[1] They argued that the Act as amended effects a taking of their property without just compensation and without an adequate process for securing just compensation. The district court agreed that the Act effected a taking of property, but the court granted summary judgment in favor of the federal defendants after concluding that the amendment did not necessarily deny the utilities just compensation. See *Gulf Power Co.* v. *United States*, 998 F. Supp.1386 (N.D. Fla. 1998). The court held, moreover, that the procedure for determining compensation—starting with a proceeding before the FCC—did not violate the separation of powers doctrine because the Commission's decision was subject to judicial review. See *id.* at 1397-1398.

The court of appeals affirmed. See *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1328-1331 (11th Cir. 1999). The court of appeals declined to reach the utilities' argument that the statutory formula is constitutionally inadequate. The court held that it "d[id] not believe this issue is ripe for decision" becuase "it would require sheer speculation for us to conclude that the actual rates ordered by the FCC will fail to provide just compensation." *Id.* at 1338. With respect to the utilities' procedural argument, the court agreed with the district court that, although the 1996 Act authorizes a taking of the utilities' property, the Act provides an effective procedure for awarding just compensation that does not violate the Separation of Powers doctrine. The court explained: "Had the Act eliminated all possibility of judicial review and made the FCC the final arbiter of a

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[1] The other utilities were Duke Power Company, Florida Power Corporation, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Ohio Edison Company.

utility's compensation, we would be faced with a different situation, but the Act does not do that. Instead, as we have explained, the Act merely provides that the FCC has the first cut at fashioning the compensation a utility receives for the taking of its property." *Id.* at 1337.

4. For some 20 years, petitioner rented excess space on its poles to cable television companies at a negotiated rental rate calculated under the statutory formula applicable to attachments by cable television systems. See 47 U.S.C. 224(d)(1). Just before the instant proceedings commenced, petitioner was charging $7.47 per pole per year, which was in line with the statutory maximum. Then, in June 2000, petitioner announced that it was unilaterally rescinding all existing agreements with the cable companies, and it told the companies that if they wished to maintain their existing attachments they would have to begin paying an annual rate of $38.81 instead of $7.47. The cable companies filed a complaint with the FCC. Pet. App. 87a-96a.

Petitioner did not attempt to justify the new rate under the statutory formula. Pet. App. 91a. Instead, petitioner asserted that the rate for cable attachments had been rendered constitutionally deficient by the mandatory access provisions of the 1996 amendments to the Pole Attachments Act. Petitioner's relationship with the cable companies was now an involuntary one, petitioner argued, which in petitioner's view entitled it to a much higher level of compensation than would be permitted under the statutory formula. *Id.* at 92a-93a.

The FCC granted the cable companies' complaint and ordered petitioner to renegotiate a rate that complies with the statutory formula. Pet. App. 83a, 96a. With respect to petitioner's just compensation claim, the Commission first observed that the statutory rate,

which provides for the recovery of the incremental costs caused by the cable attachment plus a proportionate share of the fully allocated cost including the actual cost of capital, is not confiscatory. *Id.* at 62a (citing *Florida Power*, 480 U.S. at 253-254).[2] The Commission found that "th[e] measure of [just] compensation is not changed simply because the regulation restricting the use of the property amounts to a physical occupation under *Loretto* [v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." *Id.* at 66a.

The Commission also examined whether, if the mandatory access required by the 1996 Act did require application of a different standard for just compensation, that standard would be satisfied as well. The Commission applied the general principle that "[j]ust compensation is generally determined by the loss to the person whose property is taken." Pet. App. 68a (citing *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)). The Commission noted that "the nature of cable television pole attachment rights and interests, and the monopoly inherent in the poles owned by [petitioner] and other utilities, affect the measure of compensation." *Id.* at 69a. The Commission explained that "[i]n any specific area, there is only one provider of pole space and there is usually surplus space on those poles." *Ibid.* Because there is "no viable alternative" to

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[2] The Commission explained that "[t]he Commission's pole attachment formula ensures that a utility receives full compensation for any loss incurred as a result of an attachment. The attacher directly compensates the utility through make-ready and change-out charges for the cost of any modifications to utility poles necessitated by the attachments, including pole rearrangements, inspections, pole replacements, and other direct incremental costs of making space available to the cable operator." Pet. App. 63a-64a.

use of the existing poles for cable attachments, the utilities' poles have "bottleneck monopoly status"—a conclusion as to which "no credible evidence" to the contrary "has ever been presented to the Commission." *Ibid.* In those circumstances, and in light of the fact that "there is no non-monopoly market in pole attachments," *ibid.*, the Commission found that each of the alternative valuation methods proffered by petitioner was inadequate.

Because "other industries, technologies and property rights * * * are too different to draw any meaningful conclusions," petitioner "was unable to show that there is any reasonable way to evaluate a pole attachment value using a comparable sales approach" that would draw on other industries and technologies. Pet. App. 69a-70a. Because "the income generated by a cable television system is the product of many tangible and intangible assets and cannot be attributable to its pole attachment," petitioner also "failed to meet its burden to show that" an income capitalization method based on the income the pole attachment could generate for a cable television system "is required or even appropriate." *Id.* at 70a. Finally, the Commission found that "requiring the use of replacement costs as a measure of just compensation is inappropriate," because of the "limited property interest" occupied by a pole attachment, the fact that the "pole attachment does not displace the utility from its own use of the pole or from the right to license additional users on the pole," the fact that "the utility's interest in the property is not completely destroyed," and the fact that "it is not feasible to reproduce existing utility poles." *Id.* at 71a. The Commission concluded that petitioner "has not provided any credible evidence that shows that [it] is not compensated fully under the [statutory] formula and

placed in the same position monetarily as it would be but for the attachments." *Id.* at 72a.

5. The Eleventh Circuit affirmed. The court of appeals agreed with petitioner that "[w]hen a physical taking is at issue, * * * a different analytical hat must be worn" than when a mere rate regulation is examined under the Just Compensation Clause. Pet. App. 15a. Nevertheless, the court held that the rate for cable attachments satisfies the constitutional standards for just compensation.

The court began by recognizing the "rigid rule for determining just compensation" that "[i]n physical takings cases, the property owner generally must receive the 'full monetary equivalent of the property taken.'" Pet. App. 16a (quoting *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970)). Although "[t]ypically, fair market value is used," an "alternative to fair market value must be used" in this case because "[t]here is not an active, unregulated market for the use of 'elevated communications corridors.'" *Ibid.* The court noted that the guiding principle in determining an alternative to fair market value is that "just compensation is determined by the loss to the person whose property is taken," not the special value of the property for the governmental use to which it is put. *Id.* at 17a-18a.

The court held that the statutory rate was satisfactory in this case, based on two considerations. First, the court noted that the statutory rate requires the attaching company to pay "much more than marginal cost," because it requires the attacher to pay *both* all of the marginal costs of the attachment, including "the opportunity cost of capital devoted to make-ready and maintenance costs," *and* "some portion of the fully embedded cost." Pet. App. 17a. Second, the court explained that the "use [of a pole] by one entity does not

necessarily diminish the use and enjoyment of others," because there is ordinarily ample space on the pole for all attachments and a cable company's attachments "do[] not foreclose any other use" of the pole by the power company. *Id.* at 18a, 19a. Relying on the Second Circuit's decision in an analogous circumstance in *Metropolitan Transportation Authority* v. *ICC*, 792 F.2d 287 (1986), the court found that, based on those facts, "marginal cost will be sufficient to compensate the pole owner" and the statutory formula—which allows for a much higher rate—provides just compensation. Pet. App. 19a.

The court of appeals noted the limits of its holding. The court's reasoning depended on the proposition that the utility had no lost opportunity cost, because it had no other use for the pole space occupied by the cable attachment. That proposition, the court noted, was reasonable on this record, because "nowhere in the record did [petitioner] allege that [petitioner's] network of poles is currently crowded." Pet. App. 20a. The court held, however, that a utility could advance a claim that the statutory rate does not provide just compensation if it could show "with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations." *Id.* at 21a. The court held that, "[w]ithout such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Assuming that the non-discrimination provisions added to the Pole Attachments Act in 1996 effect a taking, the court of appeals correctly held that the statutory rate for cable attachments, which provides for a payment to petitioner that is "much more than the marginal cost" caused by the attachments, Pet. App. 17a, provides just compensation for the value of the property interest taken.[3] In reaching that holding, the

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[3] The court of appeals in this case adhered to its holding in its prior *Gulf Power* decision that the amended Pole Attachments Act effects a taking. See Pet. App. 9a. That holding was based on the court's belief that the taking issue was controlled by *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that a law that required a landlord to permit the physical occupation of his property by cable television fixtures constituted a physical taking. See *Gulf Power*, 187 F.3d at 1328-1331. The court rejected the contention that the taking issue is instead controlled by *Florida Power*, which held that the pre-1996 version of the Pole Attachments Act does not contain that element of "required acquiescence" and therefore does not effect a taking. See *Florida Power*, 480 U.S. at 252. The amended Act, however, continues to define a utility as an entity that, inter alia, "owns or controls poles * * * *used, in whole or in part, for any wire communications.*" 47 U.S.C. 224(a)(1) (emphasis added). Accordingly, so long as a power company remains outside the wire communications business, it is not a "utility" under the Act and is under no obligation to permit cable television attachments. It is only when a utility chooses to use its poles to enter the "wire communications" business, and thereby to enter a field of pervasive regulation, that it becomes subject to the Section 224(f)(1) nondiscrimination requirement and, consequently, to the requirement that it permit cable attachments to those poles. Moreover, in the context of a heavily regulated industry, a nondiscrimination or equal access provision closely re-

court relied on the fact that "the cable company's use does not foreclose any other use." Pet. App. 19a. Accordingly, there is ample available space on the utility poles that will not be used for any other purpose, and the attachment of cable television wires to petitioner's utility poles will not cost the utility anything in terms of "lost opportunity or any other burden." *Ibid.* Indeed, if a utility company has "insufficient capacity" on its pole or if there are "reasons of safety, reliability, and generally applicable engineering purposes" that preclude attachment of a cable television wire, then the utility may refuse to permit the attachment. See 47 U.S.C. 224(f)(2); see also *Southern Co.* v. *FCC*, 293 F.3d 1338, 1346-1347 (11th Cir. 2002) (setting aside, as inconsistent with Section 224(f)(2), FCC regulation requiring utilities to expand capacity to accommodate an attachment). The court therefore correctly discerned that this case involves an unusual form of "nonrivalrous" property interest, in which "use by one entity does not necessarily diminish the use and enjoyment of others." Pet. App. 18a. The court of appeals correctly held that, in light of the nature of the property interest at issue and the limited intrusion on that interest by a cable television wire, the statutory compensation formula provides just compensation.

2. a. The decision of the court of appeals is consistent with the only other federal appellate decision addressing the appropriate measure of compensation in a comparable situation. In *Metropolitan Transporta-*

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lated to rate regulations is properly analyzed as a regulatory measure, rather than a physical taking. For those reasons, the question whether there is a taking in this case is controlled by *Florida Power*, not *Loretto*, and the court of appeals erred in finding that the amended Act effects a taking.

tion Authority v. *ICC*, 792 F.2d 287 (2d Cir. 1986), the Interstate Commerce Commission, acting pursuant to statutory authority, ordered the MTA, a commuter railroad, to permit AMTRAK to use 74 miles of its track for AMTRAK's intercity trains. AMTRAK's use of the trackage did not interfere with the MTA's use of the same trackage for its own trains. The court of appeals held that, assuming that there was a taking, "compensation is adequate since the MTA, *in obtaining avoidable costs*, will receive what it would have had but for the taking." *Id.* at 297 (emphasis added). As the court explained, "the owner * * * will be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation." *Ibid.* The court concluded that "there is no support for [the MTA's] claim that [the] adoption of the avoidable cost methodology is constitutionally infirm" under those circumstances. *Id.* at 298.

Petitioner argues (Pet. 15) that "'[m]arginal cost' has never been a recognized proxy for market value" and that *Metropolitan Transportation Authority* is inapposite because it "is not a takings case; it is a rate regulation case." That is incorrect. The Second Circuit in *Metropolitan Transportation Authority* based the pertinent part of its decision on the assumption that there had been a taking, see 792 F.2d at 297 ("assuming arguendo that there has been a taking"), and it held, based on that assumption, that "compensation is adequate." *Ibid.* Indeed, the Second Circuit specifically agreed with the Eleventh Circuit in this case on the subsidiary principle that "[t]he model of negotiation between a willing buyer and a willing seller is inappropriate to the instant case," *id.* at 298, for the same reason that that model is inapplicable here. In both

cases, the absence of any genuine fair market for the property interest at issue would make it impossible to determine directly the "market value" of the property to the seller.

b. The decision of the court of appeals is also consistent with the remand proceedings that followed this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). After this Court held that the installation of cable television equipment on the rooftop of an apartment house was a physical taking, the state court on remand noted that "there is little reason to believe that landlords will receive any greater amount in * * * 'just compensation'" than allowed by the state law at issue—which was "in most cases $1.00." *Loretto* v. *Group W. Cable*, 522 N.Y.S.2d 543, 546 (App. Div. 1987), appeal denied, 71 N.Y.2d 802 (Table), cert. denied, 488 U.S. 827 (1988). If a nominal sum was sufficient in *Loretto* to provide just compensation, the statutory formula for cable attachments in this case—which permits recovery of marginal costs *plus* a proportional percentage of the total costs of the pole—must be adequate as well.

3. Petitioner argues (Pet. 9) that "this case presents the Court with an opportunity to clarify the constitutional issue that divided this Court in *Brown* [v. *Legal Foundation of Washington*] * * *, *i.e.*, the continued viability of the black-letter rule that fair market value is the measure of compensation in physical takings cases." The Court in *Brown*, however, was not divided about "the continued viability" of the "fair market value" measure in takings cases, and this case would not clarify any issue left open by *Brown*.

Brown involved the calculation of just compensation for interest earned on certain pooled escrow accounts, where each individual sum invested in the pooled

accounts could not, on its own, have earned any net interest for its owner. The Court held that "just compensation is measured by the net value of the interest that was actually earned" by the owners of the money, which the Court found to be zero. *Brown* v. *Legal Foundation of Washington*, 123 S. Ct. 1406, 1420-1421 n.10 (2003). The dissent argued that the Court should have instead focused on the total—rather than the net—amount of the interest earned, and the dissent argued as well that the Court's conclusion that the net value was zero was mistaken. *Id.* at 1426-1427. Because *Brown* involved the interest earned on money, *Brown* did not require the Court to address any question related to the crucial issue in this case, which concerns how to place a monetary value on a particular property interest that has no market value outside the context of government-regulated rates.

Moreover, both the Court in *Brown* and the dissent accepted a key principle underlying the court of appeals' decision in this case. The court of appeals here relied on the principle that "just compensation is determined by the loss to the person whose property is taken," rather than the special value to the government of the condemned property. Pet. App. 17a-18a. The Court in *Brown* calculated just compensation in the same way, relying on the principle that "compensation is measured by the owner's pecuniary loss," rather than the gain to the government. 123 S. Ct. at 1421. The dissent in *Brown* did not disagree that "just compensation consists of the value the owner has lost rather than the value the government has gained," although it argued that the two were the same on the facts of *Brown*. *Id.* at 1426 (Scalia, J., dissenting). In short, this case does not present any question left unanswered by *Brown*.

4. Petitioner contends (Pet. 13) that "the court of appeals inappropriately applied rate regulation principles to a physical takings case." The court of appeals, however, clearly decided this case on the premise that it involved a physical taking and that the just compensation analysis applicable in such cases is different from the analysis applicable to a rate regulation case not involving a physical taking. The court stated that "[t]he FCC inappropriately focused on ratemaking cases" and explained that "[w]hen a physical taking is at issue, * * * a different analytical hat must be worn." Pet. App. 15a.[4]

Petitioner also argues (Pet. 15-16) that "[t]he most glaring example of the court of appeals' own ratemaking analysis is its * * * conclusion that the disparate rates for the taking of identical pole space (i.e., the Cable Rate vs. the Telecom Rate) is 'irrelevant' due to Congress' 'legislative discretion.'" Petitioner's argument rests upon a misunderstanding of the

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[4] For that reason, petitioner's complaint that the court of appeals approved a "historical cost measure" in this case is mistaken. The statutory formula compensates petitioner at actual, present value for the incremental costs associated with cable attachments. See, *e.g.*, *In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 F.C.C.R. 12103, 12119 n.120 (2001) (utilities may recover "up front," i.e., in advance, "the full amount of make-ready or pole change out costs"). The statutory formula does use historical costs to measure the additional amount, over incremental costs, that petitioner receives for its proportionate share of the pole space used by the cable attachment. But the court of appeals did not rely on that use of historical costs. Instead, the court held that the statutory rate provides just compensation because it undoubtedly yields "much more than marginal cost," Pet. App. 21a, thus making it of no significance whether the "much more than marginal cost" amount is derived using historical costs, present value, or some other methodology.

Just Compensation Clause. The Clause sets a minimum —not a maximum—amount that the government must pay when it effects a taking of a property right. Because the rate for cable television attachments satisfies the constitutional minimum of "just compensation," Congress's determination that other pole attachers should pay a higher rate is indeed irrelevant. See Pet. App. 21a n.23.[5] The court's observation that it is irrelevant that different attachers pay different rates demonstrates that the court was focused on the proper just compensation analysis.

4. a. Petitioner contends (Pet. 17) that the court of appeals erred because it "abandoned the *hypothetical* willing buyer/willing seller standard, instead requiring that [petitioner] prove the existence of an *actual* buyer 'waiting in the wings' before it can claim that its property has any value." *Ibid.* That contention, too, is mistaken.

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[5] Petitioner argues (Pet. 16) that the higher Telecom Rate demonstrates "immediate, identifiable and rivalrous 'lost opportunity.'" See Pet. 25 ("Once a cable company attaches * * *, [petitioner's] limited communications space is lost (on average)."). That would be true only if petitioner were forced to permit a cable television system to use up pole space that could otherwise have been provided to another entity, such as a telecommunications service provider, at a higher price. Although petitioner now argues (Pet. 24-25) that its poles are crowded, its calculations are inconsistent with the FCC's presumptions regarding pole height and usable space, see Pet. App. 73a-74a; as the Commission noted, although those presumptions are rebuttable, *id.* at 73a, petitioner did "not provide[] data that would overcome" them. *Id.* at 73a, 74a. Indeed, petitioner did not make the showing that *any* of its poles is crowded. See Pet. App. 20a ("[N]owhere in the record did [petitioner] allege that [its] network of poles is currently crowded."). Accordingly, it is too late for petitioner to make arguments in this Court based on an alleged lost opportunity cost.

Initially, the court of appeals did not hold that a plaintiff in a takings case must always show the existence of an actual buyer "waiting in the wings" before it can claim that its property had value. The court simply held that, in the context of this case, petitioner cannot claim that its compensation can be determined by the value of its lost opportunities unless it can show that there are other valuable uses for the pole space occupied by the cable attachments. See Pet. App. 21a ("[T]here is no 'lost opportunity' foreclosed by the government" unless petitioner can show that its poles are "at full capacity" and there is an alternative "higher-valued use."). Petitioner did not make that showing, and it accordingly was not entitled to compensation for lost opportunity costs.

The court of appeals recognized that the fair-market-value measure of just compensation is applicable in the vast run of cases. See Pet. App. 16a ("Typically, fair market value is used" as the measure of just compensation, and "[f]air market value is established by determining what a willing buyer would pay in cash to a willing seller.") (internal quotation marks omitted). In this case, however, the court of appeals followed long-settled precedent in disagreeing with petitioner's attempt to construct a fair market value for cable pole attachments. It has long been clear that, although market value is ordinarily the appropriate measure for just compensation, "[o]ther measures of 'just compensation' are employed * * * when market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public." *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 10 n.14 (1984); see *United States* v. *50 Acres of Land*, 469 U.S. 24, 29 (1984); *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *United States* v. *Miller*,

317 U.S. 369, 374 & n.16 (1943) (citing cases). Indeed, although petitioner repeatedly invokes (see Pet. 9-10, 12, 28) the dissenting opinion in *Brown* v. *Legal Foundation of Washington*, 123 S. Ct. at 1422 (Scalia, J., dissenting), that opinion did not state that a direct determination of fair market value is the only measure that may ever be used to determine just compensation. To the contrary, that opinion noted that this Court's cases have "recognized * * * two situations in which [the fair market value] standard is not to be used: when market value is too difficult to ascertain, and when payment of market value would result in 'manifest injustice' to the owner or the public." *Id.* at 1423 (Scalia, J., dissenting).

The court below correctly determined that this was a case in which a direct determination of fair market value did not provide the right measure of just compensation. "[A]n alternative to fair market value must be used" here because "[t]here is not an active, unregulated market for the use of 'elevated communications corridors.'" Pet. App. 16a. Fair market value is impossible to ascertain in this case because, as the FCC found, "[t]here are no arm's length transactions reflecting the prices paid by willing buyers and sellers for comparable pole attachments." *Id.* at 69a.[6] Moreover,

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[6] It is instructive, however, that under the Pole Attachments Act before attachment rights became mandatory, petitioner was willing to sell attachments at $7.47 per year and the cable companies were willing to pay that rate. Although there were regulatory constraints on the rate, petitioner had the option of not selling under that pre-1996 regime if it were not receiving an adequate return. Indeed, petitioner is subject to the nondiscrimination provision of Section 224(f)(1)—and the consequent obligation to permit cable attachments where possible—only because it has become a participant in the heavily regulated wire communications business.

calculation of market value as petitioner sought would result in "manifest injustice" because there is a "monopoly inherent in the poles owned by [petitioner]." *Ibid.* As this Court recently noted, "[t]he very reason for the [Pole Attachments] Act is that—as to wires—utility poles constitute a bottleneck facility, for which utilities could otherwise charge monopoly rents." *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 340 (2002). This Court has long recognized that just compensation does not include compensation for the monopoly power that a particular owner may exert. See *United States* v. *Cors*, 337 U.S. 325, 334 (1949) (government cannot be compelled to pay "hold-up value" for property taken); *United States* v. *Miller*, 317 U.S. 369, 375 (1943) ("special value to the condemnor * * * must be excluded"); see also *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 125-127 (1950). The court of appeals' determination to utilize an alternative valuation was therefore dictated by settled principles of the law of just compensation.[7]

5. Petitioner contends (Pet. 18-20) that the court of appeals' decision is inconsistent with the principle of

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See note 3, *supra*. The calculation of just compensation in this case may reasonably take that fact into account. See *United States* v. *Commodities Trading Corp.*, 339 U.S. 121 (1950) (government-set ceiling price provides just compensation for taking of property subject to that price).

[7] Petitioner contends (Pet. 21-22) that the prices paid for leasing a right-of-way from the federal government provides a measure of the fair market value. The fact that owners of real property demand certain rates for rental of their property in arm's-length transactions does not, however, establish a fair market value for the different interest at issue here—attachment space on a non-crowded utility pole for which there is no free market.

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 327 (1893), that "the right to determine what shall be the measure of compensation" is "a judicial, and not a legislative, question." Petitioner is mistaken. *Monongahela* rests on the principle that the judicial branch is entrusted under the Constitution with the ultimate responsibility of ensuring just compensation. That principle is consistent with permitting the other branches of government to determine, in the first instance and subject to judicial review, the amount that should be paid for property taken. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 151 n.39 (1974); see also *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) ("[A]ll that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking."); *Wisconsin Central Ltd.* v. *Public Service Comm'n*, 95 F.3d 1359, 1367-1369 (7th Cir. 1996). As the court of appeals explained, there are numerous means by which a court of appeals could "gather the information needed to determine just compensation" and thus exercise its constitutional responsibility. See Pet. App. 9a n.9; *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1333-1334 (11th Cir. 1999). In this case, the court of appeals carefully reviewed the statutory formula and the FCC's administration of that formula. Although petitioner complains (Pet. 20) that the court of appeals "turned a blind eye toward [petitioner's] evidence," the court's disagreement with petitioner over the correct measure of just compensation on the particular facts of this case made it unnecessary for the court to examine the factual validity of petitioner's evidentiary submission.[8]

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[8] The utility trade associations that filed a brief as amici curiae

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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in support of petitioner are primarily concerned with the future application of the rate for cable attachments to attachments to non-distribution utility property, such as transmission facilities and rights-of-way, and to attachments by wireless communication facilities. Amici Br. 4-5 & n.6. They claim that the issues raised by such attachments "should not be re-argued before the [FCC] and re-litigated before the courts if they can be addressed fully and settled in this case." Amici Br. 6. Rate regulation for such attachments, however, was not at issue below. The trade associations' concerns can and should be addressed in the first instance by the FCC, not by this Court.

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IN THE

Supreme Court of the United States

ALABAMA POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT IN REPLY

Respondents argue that the Government can take property and pay nothing for that property. It cannot.

Respondents principally rely on two flawed arguments. First, they argue that just compensation should be determined by a "loss to the owner" standard that excludes fair market value. This argument ignores the precedent of this Court providing that the loss to the owner is measured by fair market value or, in the absence of readily available market data, a reasonable proxy. Marginal cost is neither a recognized nor a reasonable proxy for fair market value. Second, Respondents rely on two cases in which the fair value of the property at issue was held to be nominal where no other marketable uses for the property existed. In this case, however, the Record, as well as Congress's provision of a higher rate for telecommunications providers, demonstrates that numerous marketable uses for utility pole space do in fact exist. Such uses constitute "lost opportunities" ignored by the Respondents' arguments and the court of appeals' unprecedented analysis.

The amount of just compensation due for taking utility pole space is an issue of national importance that should be settled by this Court.

I. THE "LOSS TO THE OWNER" MEASURE OF JUST COMPENSATION IS SYNONYMOUS WITH FAIR MARKET VALUE OR A RECOGNIZED PROXY.

A. Respondents Distort The "Loss To The Owner" Standard.

Throughout their Briefs in Opposition, Respondents imply that the "loss to the owner" measure of just compensation somehow yields a result different in this case from fair market value or a recognized proxy. *E.g.*, Int. 14 ("But 'market

value' does not apply in circumstances where there is no 'market.' Instead, the general, governing standard for determining just compensation is 'loss to the owner.'"). This argument suffers from several fundamental flaws. First, this Court has defined "just compensation" as "the full monetary equivalent of the property taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970). The "full monetary equivalent" is determined by the fair market value at the time of the taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 625 (2001). If the full monetary equivalent cannot be determined by reference to a readily available market price, this Court utilizes proxies for fair market value. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). The point here, which appears to be lost on Respondents, is that the proxy yields (in theory, at least) a result consistent with fair market value, had such a readily available market price existed. In takings cases, fair market value is always the target.

Second, fair market value in the just compensation context is determined only by the best available information. There is no actual negotiated sale of the specific piece of property at issue. Instead, just compensation is measured by what a hypothetical willing buyer would pay a hypothetical willing seller. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). If the property at issue were publicly traded stock, the best available information would be the listed exchange price (NYSE, NASDAQ, etc.). If the property at issue were privately traded real estate, the best available information would be comparable sales. *See United States v. 50 Acres of Land*, 469 U.S. 24, 30 (1984). If no comparable sales are available, the "loss to the owner" is measured by a fair market value proxy, such as income capitalization, replacement cost, etc. *Cf. 564.54 Acres of Land*, 441 U.S. at 515; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). Even Respondents recognize this. *E.g.*, Int. 14-15. Fair market value (and any proxy for fair market value) is nothing more than a best-available-data

approximation of the "loss to the owner." To suggest a conceptual incongruity between fair market value and "loss to the owner" is to reject this Court's requirement for the payment of "the full monetary equivalent of the property taken."

The Government notes "[o]ther measures of 'just compensation' are employed" if market value is too difficult to determine. Resp. 19 (quoting *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 n.14 (1984)). Respondents, however, reject these "other measures" and advocate a methodology that provides *no measure* of the value of the property taken. Simply paying utilities the marginal costs they incur in getting a pole ready to support a cable attachment does not compensate the owner for the value of the actual pole space taken. Marginal cost plus nothing is not a recognized constitutional measure of just compensation.

B. Alabama Power Company's Loss Can Be Measured By Its Lost Opportunity To Lease The Same Property At A Higher Price.

"[B]ecause the Pole Attachments Act [of 1978, as amended by the Telecommunications Act of 1996,] effects a physical taking, pole owners are entitled to market value for granting access to their poles, and such value properly includes opportunity cost . . . ." Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 Cornell L. Rev. 885, 1001 (2003). Alabama Power Company's opportunity cost is not merely theoretical, as the court of appeals held and Respondents argue. *E.g.*, Pet. App. 19a. ("[I]t would not make sense for the power companies to say, 'Even though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell to the government at what we deem the full market price of this pole space.'"); Int. 23 ("Petitioner's claimed right to sell pole space at 'an unregulated rate to a non-cable or non-telecom business' was never made, let alone

proven, in the record below"). Instead, Alabama Power Company (APCo) presented unrebutted record evidence that some attachers are willingly paying APCo's just compensation price of $38.31 (based on replacement cost) for identical space. APCo's Answer to Petition for Stay, Ex. 1, ¶ 14.[1] APCo also presented unrebutted evidence that it receives annual rentals between $25 and $40 for similar attachments under its unregulated joint use agreements with telephone companies (*id.* at ¶ 13),[2] that non-communications companies are paying up to $40 per pole annually for this same pole space (APCo's Notice of Filing Supplemental Authority, pp. 5-6), and that its poles are crowded (Pet. 24-25). Moreover, Congress itself has recognized the existence of other attachers (*i.e.*, telecommunication companies) and the availability of a higher rate (Telecom Rate) in the same statute under which Respondents seek refuge. *Cf. Nemmers v. City of Dubuque*, 764 F.2d 502, 504 (8th Cir. 1985) ("In determining market value, we have approved the use of evidence of comparable sales as the 'best evidence' of [just compensation] damages.").

With respect to the Telecom Rate, which is substantially higher than the Cable Rate, Respondents contend that (1) "the rate for telecommunications attachments has no constitutional significance," and (2) "Congress's determination that other pole attachers should pay a higher rate is indeed irrelevant." Int. 22; Resp. 18. These conclusory assertions do nothing to alter the fact that, at a minimum, Congress recognized a more

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[1] Since the proceeding before the FCC, attachers have voluntarily continued to pay just compensation prices to APCo and other utilities. *See, e.g.* Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing, p. 12, *Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, FCC, P.A. No. 00-004 (pending proceeding).

[2] Because part of the consideration in joint use agreements involves reciprocal privileges, the actual rental charge is deflated. APCo's Response to Complaint, Ex. B, p. 26.

"full monetary equivalent" for the exact same space. Only the Government attempts to offer an explanation for the disparity: "The [Just Compensation] Clause sets a minimum, not a maximum, amount that the government must pay when it effects a taking of a property right." Resp. 18. There are at least three analytical errors with this explanation. First, the very notion of a "range" of compensation smacks of rate regulation. Even the court of appeals acknowledged, "[w]hen a physical taking is at issue, however, a different analytical hat must be worn." Pet. App. 15a. Second, it is anathema to the principles of just compensation that *identical* property on the *exact* same pole could yield prices of $6.30 and $20.41, respectively. Third, even a so-called "minimum" amount of just compensation should not yield a "favorable" price for either the taker or the property owner. However, this is precisely what the Cable Rate yields. AT&T, one of the Intervenors, boasted to its stockholders after the enactment of the Telecommunications Act of 1996 (1996 Act) that the "favorable" Cable Rate remained intact. Congress itself acknowledged, "[t]he formula, developed in 1978, gives cable companies a more favorable rate for attachment than other telecommunications service providers. The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy." H. R. REP. NO. 104–204, at 91 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58.

C. *Metropolitan Transportation* And *Loretto* On Remand Are Inapposite.

Respondents attempt to justify the court of appeals' marginal-cost-plus-nothing approach based on a legally and factually distinguishable Second Circuit case, *Metropolitan Transportation Authority v. ICC*, 792 F.2d 287 (2nd Cir. 1986), and baseless assumptions regarding state court treatment of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), on remand. Int. 19-21; Resp. 13-15. The Government claims that APCo was "incorrect" in

arguing that *Metropolitan Transportation* is inapposite because it "is not a takings case; it is a rate regulation case." Resp. 14 (quoting Pet. 15). While Respondents may dispute whether *Metropolitan Transportation* is inapposite, they cannot credibly dispute that it was, indeed, a rate regulation case. Respondents rely on a portion of the opinion that states, "assuming arguendo that there has been a taking, compensation is adequate . . . ." *Metropolitan Transp.*, 792 F.2d at 297. This statement is dicta — nothing more and nothing less. Nothing in *Metropolitan Transportation* (dicta or otherwise) comes close to a sound just compensation analysis.

Moreover, the use of the property at issue in *Metropolitan Transportation* is fundamentally different than the use of the property at issue in this case. As the court of appeals below noted of *Metropolitan Transportation*: "Allowing traffic from one railroad rarely means that another railroad is precluded from traveling on the same line unless, of course, the line is already crowded." Pet. App. 20a. This analysis (although erroneous in any takings case) is far less offensive for the sporadic use at issue in *Metropolitan Transportation* than in a case where, as here, once the property is taken, it is forever lost to the owner.[3] Further, the court of appeals in *Metropolitan Transportation*, 792 F.2d at 298, specifically noted: "The model of negotiation between a willing buyer and a willing seller is inappropriate to the instant case: Amtrak is the only passenger railroad that has or seeks to have access to Metro-North's lines . . . ." In this case, however, there are now many marketable uses for APCo's utility pole space, including the support of telephone, cable television, Internet, wireless communication, and other miscellaneous attachments. *See, e.g.*, APCo's Answer to Petition for Stay, Ex. 1 ¶¶ 13-14; APCo's Notice of Filing

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[3] The cable wires attached to APCo's poles are not passing trains.

Supplemental Authority, pp. 5-6. In addition, since *Metropolitan Transportation* was decided, the market has changed. Since 1986, several large railroads and the Metropolitan Atlanta Rapid Transit Authority have begun to allow cable and pole line companies to bury cable along their rights-of-way in exchange for fair market value rents. APCo's Response, Ex. 5, pp. 16-17 & 30.

Loretto on remand likewise misses the mark. The Government argues: "If a nominal sum was sufficient in *Loretto* to provide just compensation, the statutory formula for cable attachments in this case . . . must be adequate as well." Resp. 15. There are several problems with this argument. First, nowhere in *Loretto* on remand did the state court engage in a marginal cost analysis or otherwise endorse marginal cost as a fair market value proxy. Second, nothing in the opinion suggests that Jean Loretto proffered any evidence of alternative uses or market value for her property. Third, and perhaps most importantly, once *Loretto* was remanded to the State Commission on Cable Television for a determination of just compensation, Jean Loretto never "made application to the Cable Commission for reasonable (now referred to in the Commission regulations as 'just') compensation. Instead, plaintiff . . . filed the present motion to recover more than half a million dollars in attorneys' fees from the defendant and the intervenor." *Loretto v. Group W. Cable*, 522 N.Y.S.2d 543, 545 (N.Y. App. Div. 1987). Thus, for aught it appears, Jean Loretto never pursued the just compensation issue — only the foundational issue of whether or not a taking had occurred.

Much more on point than *Metropolitan Transportation* or *Loretto* on remand are the practices of both the Government and the cable companies in charging telecommunications carriers fair market value for access to their rights-of-way. *See, e.g.*, TeleCommunity Alliance, *Valuation of the Public Rights-of-Way Asset*, p. 1 n.1, *available at*

http://www.telecommunityalliance.org/images/valuation 2002.pdf (last visited July 16, 2003); 43 C.F.R. §§ 2803, 2883 (2003). Respondents cannot square their contention that *Metropolitan Transportation* justifies paying only marginal costs for APCo's rights-of-way with their own practices of collecting both marginal costs and fair market value rents for their rights-of-way. 43 C.F.R. §§ 2883.1-1 (providing for reimbursement of costs incurred by the Government in granting access); 2803.1-2 (providing for an annual "fair market rental value determined . . . applying sound business management principles and, so far as practicable and feasible, using comparable commercial practices"); APCo's Response, Ex. B, pp. 8-17 & 29-30 (Comcast owns cellular commuications towers and typically charges market rates for attachments ranging from $18,000 - $21,600 annually); Pet. 20-23.

D. Alabama Power Company Does Not Seek A Monopoly Rent.

Respondents not only advocate a rent for actual space taken that is too low ($-0-), but also imply that APCo is seeking a rent that is too high — a monopoly rent. *E.g.*, Resp. 2, 8, & 21. This argument fails both analytically and factually. First, the fact that APCo seeks a price different from that set by the Government pursuant to the Cable Formula does not mean that APCo seeks a price wholly free from review. Indeed, APCo's fundamental argument has consistently been that the price for pole space taken should be set by the courts at fair market value (or a recognized proxy therefor), not at a monopoly price.[4] Second, APCo's charge

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[4] In any event, *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), at a minimum, provides for judicial review of the just compensation owed to a property owner for any taking. APCo is no more entitled to a monopoly price than the cable companies are entitled to a "favorable" or "beneficial" rate. *See* p. 5, *supra*.

of $38.31 per pole is based on actual replacement cost, *i.e.*, the cost of wooden poles, labor, etc. The supply of these items is not subject to monopoly control.

II. THE PHYSICAL TAKING OF SPACE ON UTILITY POLES EFFECTED BY THE 1996 ACT RAISES ISSUES OF NATIONAL IMPORTANCE.

In *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 n.6 (1987), this Court reserved the precise question presented for review in this Petition. Since then, this Court has resolved questions raised by the 1996 Act regarding the authority of the FCC to regulate emerging telecommunications competitors in a "crucial segment of the economy worth tens of billions of dollars" and regarding the Act's coverage of utility pole attachments by Internet and wireless service providers. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999); *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002). Since APCo filed its Petition in this case, this Court has granted petitions for writs of certiorari in *FCC v. Missouri Municipal League*, 71 U.S.L.W. 3624, 3785, 3789, 3568, 3648, 3625 (U.S. June 23, 2003) (Nos. 02-1238, 02-1386, 02-1405), to determine whether the 1996 Act pre-empts state law prohibiting municipalities from entering the telecommunications market. The answers to whether certain attachments are covered by the 1996 Act and whether additional competitors can enter the telecommunications market raise, in turn, the question of what price is to be paid for making such attachments and for entering such market.

Because the 1996 Act effects a physical taking, the price to be paid must be measured under the Just Compensation Clause. This Petition raises important questions of federal law that have not been, but should be, settled by this Court. Respondents do not, and cannot, dispute the national

importance of these issues. These issues affect all property owners, not just electric utilities. The court of appeals' decision that tangible property on utility poles has $-0- value implicates millions of miles of utility poles and conflicts with this Court's long-standing decisions that the owner must be compensated for the "full monetary equivalent of the property taken." *See Reynolds*, 397 U.S. at 16; *United States v. Miller*, 317 U.S. 369, 373 (1943); *Monongahela*, 148 U.S. at 326.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Supreme Court of the United States

ALABAMA POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* UNITED TELECOM COUNCIL AND EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the court below erred as a matter of law in holding that pole attachments are a "nonrivalrous" taking of utility property.

2. Whether the failure of the court to consider the merits of petitioner's rate for cable attachments effectively denied it judicial review in violation of its due process rights.

3. Whether the Supreme Court should grant certiorari to prevent widespread irreparable harm that would result if the decision becomes effective.

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BRIEF OF *AMICI CURIAE* UNITED TELECOM COUNCIL AND EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT[1]

The United Telecom Council ("UTC") and the Edison Electric Institute ("EEI") respectfully submit this brief as amici curiae, pursuant to Rule 37 of the Rules of this Court,

[1] In accordance with this Court's Rule 37.6, UTC and EEI respectfully state that this brief was authored entirely by counsel for the named *amici curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

in support of Petitioner. The *amici curiae* have obtained the consent of the parties to file this brief pursuant to this Court's Rule 37(a).

INTEREST OF UTC and EEI

UTC and EEI are trade associations, whose members include utilities that are required by Section 224 of the Communications Act of 1934 to provide access at just and reasonable rates for pole attachments by telecommunications providers and cable television systems. UTC and EEI have participated in various administrative proceedings and judicial actions concerning the federal regulation of pole attachments. As such, UTC and EEI are pleased to provide the perspective of the industry concerning the questions that are currently before the Court in this matter.

The United Telecom Council is the trade association for the telecommunications and information technology interests of electric, gas, water and steam utilities, pipeline companies and other critical infrastructure industries worldwide. The members of UTC include investor-owned, municipal and cooperatively organized utilities. UTC seeks to provide a favorable business, regulatory and technological environment for companies that own, manage or provide critical infrastructure telecommunications systems in support of their core businesses.

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members serve 99 percent of all customers served by the shareholder segment of the U.S. industry. It frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern.

The participation of UTC and EEI as *amici curiae* would be helpful to the Court to provide the perspective of the electric and other power utility industries concerning pole attachment regulations and to provide factual information

concerning pole attachment practices and industry trends. This information will help to explain why this Court should grant certiorari.

The utility members of UTC and EEI own or control the vast majority of the poles, ducts, conduit and rights-of-way that are subject to state or federal pole attachment regulation. Although many poles are jointly owned with telephone companies (especially with the incumbent local exchange carriers), the utility share has increased since the advent of pole attachment regulation.[2] Thus as a practical matter, most of the burden falls on utilities, even though both utilities and local exchange carriers are subject to pole attachment regulation.[3]

The reason for the trend toward electric ownership of these "telephone poles" is simple. Electric utilities remain focused on the energy services that they provide, especially on the transmission and delivery of that energy, and continued ownership and control of poles enables them to ensure the safe and reliable delivery of those services to the public. Electric utilities are required by state law to meet strict service quality levels, further underlining the need to maintain control over the poles, using their own employees

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[2] Based on an informal survey by EEI of its investor-owned utility members in 2001. Many of the largest utilities responded to the survey, and the sampling indicated that utilities own between 63% and 75% of the poles that are, or are likely to be used for pole attachments. *Compare* S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121 (finding that "[o]f the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private.")

[3] Whereas utilities must provide access at regulated rates to more infrastructure, they may not assert those rights on their own behalf, unlike telecommunications carriers that are not incumbent local exchange carriers.

that are in the majority of cases union-organized.[4] Moreover, the National Electric Safety Code restricts the types of attachments and the manner in which they may be made.[5] Revenues from pole attachment rates are typically rolled back to the ratepayers in the form of reductions in the cost of pole plant, completely discounting any notion that utility rates for access to poles, ducts, conduits and rights of way, or utility ownership of pole infrastructure, is motivated by profits from pole attachments.

The term "attachment" and the phrase "attachment rates" apply to more than just cable (or other "wireline") attachments to utility poles used for the distribution of electricity. The rates at issue in this proceeding are for access to electric utility distribution poles for the purpose of affixing facilities for the provision of cable television or other "wireline" services. Thus, these rates are referred to as "attachment rates." However, the Pole Attachment Act of 1978, as amended by the Telecommunications Act of 1996 (the "Pole/Telecomm Act"), applies also to other types of utility poles, as well as to "ducts, conduits, and rights of way." In addition, the Federal Communications Commission ("FCC" or "Commission") has held that the Pole/Telecomm Act

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[4] *See e.g.* Mich. Comp. Laws Ann. § 46.10p(5)-(8)(West 2001); N.J. Stat. Ann. § 48:2-23 (West 2001); Ohio Rev. Code Ann § 4928.10 (Anderson 2001); Or. Rev. Stat. § 757.649(2) (1999); Tex. Util. Code Ann. § 38005(a) (West 2000).

[5] The National Electrical Safety Code(R) ("*NESC*"), published by the Institute of Electrical and Electronics Engineers, Inc. ("IEEI") adopts certain standards that cover basic provisions for safeguarding persons from hazards arising from the installation, operation, or maintenance of (1) conductors and equipment in electric supply stations, and (2) overhead and underground electric supply and communication lines. *NESC*, 1997 Edition (published August 1, 1996) Abstract and § 1, p. 1. The *NESC* is a voluntary standard; however, some editions and some parts have been adopted, with or without changes, by some state and local jurisdictional authorities. *NESC*, p. vi.

applies to non-wireline attachments, such those enabling wireless services like cellular telephony—so-called "wireless attachments." *See Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151,* Report and Order, 13 FCC Rcd. 6777 (1998), rev'd *Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd. National Cable & Telecomm. Ass'n. v. Gulf Power*, 534 U.S. 327 (2002). Therefore, rates for access to all such utility property, whether for wireline or wireless equipment, are commonly referred to as "attachment" rates. Because the relevant market concerns all attachments, whether wireline or wireless, and regardless of whether to poles or other utility property, much of the supporting material cited herein by *amici* concerns access to rights of way and attachments for equipment used to provide "wireless attachments".

The FCC has not developed a precise rate formula or principles under the Pole/Telecomm Act for "attachments" to such non-distribution utility property.[6] Despite this lack of Commission action, however, takings issues raised regarding attachments to rights of way, and market factors related to wireless attachments, are directly pertinent to this case. The Fifth Amendment applies to takings of any property, regardless of its nature, and regardless of the purposes for which it is taken. Thus, the takings issues in this case are identical to the takings issues involved in the Pole/Telecomm Act-mandated "attachments" to, and attachment rates for, non-distribution utility property and wireless attachments.

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[6] In particular, this includes attachments—especially wireless attachments—to utility transmission poles. Transmission poles have a much higher cost structure than distribution poles, and utilize a different set of accounts in the financial records utilities are required to maintain by the Federal Energy Regulatory Commission. Due to this different, and much higher, cost structure, the attachment rate at issue in this case is even less appropriate for use regarding attachments to transmission poles, or in situations involving wireless attachments to any utility property.

Because both the Fifth Amendment and the Pole/Telecomm Act apply equally to all utility property, those issues should not be re-argued before the Commission and re-litigated before the courts if they can be addressed fully and settled in this case. That would be an unfair imposition of unnecessary litigation costs on utility property owners, and also a serious waste of judicial resources.

STATEMENT OF THE CASE

Ever since the passage of the Pole Attachment Act of 1978, utilities have sought just compensation for pole attachments. This Court held that the 1978 Act did not effect a taking because utilities were not compelled to provide pole attachments. Thus, the Court did not reach the question of just compensation. After the Telecommunications Act of 1996 required utilities to provide mandatory access, pole attachment regulation did effect a *per se* taking of utility property, but the courts denied two facial challenges to the statute and the FCC rates. This case now brings a specific set of circumstances that presents a controversy fully ripe for review by the Court.

REASONS FOR GRANTING THE WRIT

Introduction and Summary of the Reasons

This Court should grant certiorari to instruct the FCC that it must provide just compensation for the petitioner, to provide clear guidance that full market value is the appropriate measure of the constitutionally mandated just compensation, and to reject the precedent that marginal costs provides an appropriate measure of just compensation for the physical taking of property. Moreover, the Court should grant certiorari in this case because Petitioner has been denied judicial review in violation of its constitutional rights to due process, because the court below completely ignored its factual arguments supporting an attachment rate higher than

that allowed by the Commission. In addition, the court below failed utterly to apply the appropriate constitutional standard for a physical taking. Instead, the court fashioned a novel theory that the marginal costs of pole attachments are all that the Fifth Amendment requires for just compensation. This theory was primarily based on a single case that was a *regulatory* taking, and thus did not adopt a *per se* analysis for just compensation. The FCC and cable companies may now use that theory to justify cable rates that will have the practical effect of a general rule, even though the theory may be applied in the limited context of a pole attachment complaint proceeding. Therefore, the decision below was wrong in rationale as well as result and will cause irreparable harm to the industry if not rejected immediately.

The decision below manifests the dangers of this Court's decision in *Brown*. Here, utility property is rendered valueless on the theory that, but for the taking, the property would be presumed to have no value. The court capped just compensation at marginal costs unless a utility could demonstrate "for each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations." The court explained that pole attachments are *nonrivalrous*, that "use by one entity does not necessarily diminish the use and enjoyment of others." Even if that were true, which it is not, the underlying principle renders the Takings Clause meaningless if the government is permitted to invent a theory under which property might lack value.

The reality is that pole attachments are a valuable commodity. Cable television and telecommunications service providers profit significantly from the services they deliver via pole attachments. Of course, the value of property taken by the Government is measured by what the owner has lost, not what the taker has gained; but regulated utilities have

provided pole attachments for many decades, since long before pole attachments were regulated. Moreover, public utilities that are exempt from regulation and the Federal government have recovered market-based rates for pole attachments and similar lease arrangements. Similarly, regulated utilities continue to share joint management costs with incumbent local exchange carriers, and the fees involved are far higher than the pole attachment rates at issue in this case. Finally, there is an undeniable disparity between the FCC's cable and telecommunications rates, proving the lie that cable attachments represent the highest and best use on which to value the occupied space. Therefore, under any measure—whether market value, actual cost, or opportunity cost—the FCC-required cable rate does result in very real losses to the regulated utility, for which it is entitled to just compensation.

I. THE COURT OF APPEALS DECISION DENIES DUE PROCESS

At the moment that Congress passed the Telecommunications Act of 1996 ("1996 Act"), utilities became entitled to just compensation for pole attachments. Prior to that, utilities were not required to provide pole attachments, and thus could not raise Fifth Amendment claims as to the regulated rate for pole attachments. *See FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)(holding that Section 224 lacked the element of "required acquiescence" necessary to treat pole attachments as a physical taking). The 1996 Act amendments transformed Section 224 into a *per se* taking of utility property for which utilities are entitled to just compensation. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (1999) ("*Gulf Power I*"). Specifically, Section 224(f)(1) requires that utilities provide nondiscriminatory access for pole attachments. 47 U.S.C. § 224(f) (2002).

Until now, the question of just compensation has not been ripe for review. The Eleventh Circuit Court of Appeals held that there was an adequate process for obtaining just

compensation for the taking effected by the mandatory access provision of Section 224(f)(1). *Gulf Power I*, 187 F.3d at 1332. Utilities had argued that pole attachment regulation violated separation of powers principles, because Congress had both authorized the taking and conclusively determined the value of just compensation. *Id. citing Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). The court brushed aside those concerns, holding that "[s]o long as an administrative body's decision concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of 'provid[ing] an adequate process for obtaining compensation.'" *Id.* at 1334, *citing Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-195 (1985).

The availability of judicial review of a FCC pole attachment complaint proceeding does not satisfy constitutional concerns if the court does not adequately review the merits of an appeal, as is the case here. The U.S. Court of Appeals for the Eleventh Circuit refused to consider the evidence supporting the cable rate that the FCC rejected, apparently because the court concluded that only marginal costs are required for just compensation for pole attachments. *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002). It held instead that the FCC need not consider the evidence concerning just compensation above marginal costs, unless there is a material fact in dispute, such as "whether a pole network is operating at full capacity." *Id.*

Ironically, the utility industry finds itself right back at square one. First, utilities were told they had no right to just compensation, because the 1978 Act did not effect a taking of utility property. *Florida Power,* 480 U.S. at 251. Having shown that the 1996 Act amendments do effect a taking, utilities then were told they needed a specific set of circumstances before the courts could consider just compensation.

See Gulf Power Co. v. FCC, 208 F.3d 1268, 1273-1274 (11th Cir. 2000)("*Gulf Power II*"), *citing Gulf Power I*, 187 F.3d at 1336. Now, the same court is telling utilities that the court will not consider the specific circumstances before it, because the court is satisfied that just compensation *is* provided under an abstract legal principle that the court has conjured, based on one case that is inapposite to the type of taking at issue in pole attachment regulation. Moreover, judicial review is effectively foreclosed in the future, because utilities must now make a *prima facie* case based upon a completely unrealistic set of circumstances required under the court's reasoning. *See Section II, infra.* Therefore, UTC and EEI submit that this Court must grant certiorari to consider the merits of this case, in accordance with *Monongahela* and to provide meaningful due process for utilities.

II. THE COURT OF APPEALS DECISION APPLIES REGULATORY TAKINGS PRINCIPLES TO A PHYSICAL TAKING.

The root of the problem with the decision below lies with the court's guiding legal principle at the heart of the case. "The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken." *Alabama Power Co.*, 311 F.3d at 1369. That may be true, but the court went awry when it surmised that just compensation for pole attachments was limited to the marginal costs to utilities, based upon its conclusion that pole attachments are "*nonrivalrous*", meaning that "the use by one entity does not necessarily diminish the use and enjoyment of others." *Id.* The court opined that utilities might be entitled to just compensation above marginal costs if they show opportunity costs with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. *Id.* at 1370. This Sisyphean evidentiary burden is completely

unrealistic to meet for each and every one of the millions of utility distribution poles. Even if it could be met, it could result in two different rates applying for cable television attachments, which would defeat the mandate of Section 224(f) to provide nondiscriminatory access for pole attachments. *See* 47 U.S.C. § 224(f). Thus, the legal principle espoused by the court is practically problematic and in conflict with the most basic principle (nondiscrimination) of the 1996 Act amendments.

Moreover, the rationale of the court below is fundamentally flawed because it is based upon a single case that involves a regulatory taking, which requires a different just compensation analysis than the physical taking at issue in pole attachments. The court relied upon *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986) in which Amtrak was awarded access at regulated rates for trackage rights. The court explained that, "*Metropolitan Transportation* involved something close to a nonrivalrous good," because "[a]llowing traffic from one railroad rarely means that another railroad is precluded from traveling on the same line unless, of course, the line is already crowded." *Alabama Power Co.*, 311 F.3d at 1370. But, a closer reading of the case reveals that the court did not treat trackage rights as a taking; it stated that "requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, in order to deliver service to the public . . . fits more into the regulatory rather than the taking mode as those terms have traditionally been applied in American courts." *Metropolitan Transportation*, 792 F.2d at 296. In dicta, it did reject the argument that just compensation for trackage rights could be more than "avoidable" (i.e. marginal) costs, because the owner's "investment backed expectations" were only marginal costs to begin with. *Id.* at 297.

That is entirely different from pole attachments, which unlike transitory trackage rights, effect a permanent physical occupation of utility property, no less than the cable lines in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In fact, the court below conceded that "this case *does* in fact, trigger the *Loretto* analysis because of the element of compulsion in the 1996 Act." *Alabama Power Co.*, 311 F.3d at 1368. Nonetheless, the court analogized that pole attachments were less like land and more like trackage rights, which allowed it to depart from the "willing buyer, willing seller" standard for just compensation that applies to *per se* takings. *Id.* at 1369.

As the courts have repeatedly held, pole attachments are a permanent physical occupation of utility property. *See Gulf Power I*, 187 F.3d at 1328; *and Gulf Power II*, 208 F.3d at 1273-1274. The presence of one attachment *does* necessarily exclude the use of the occupied space by another or for utility core purposes. *Compare Loretto*, 458 U.S. at 434-435 (stating that a permanent physical occupation of property is a taking without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner.) The court below failed to acknowledge this contradiction with case precedent, and it cited no evidence on the record to support its own hypothetical assertion that utilities suffer no net loss from pole attachments.

In fact, every additional attachment to a pole (especially) or any other utility property makes it that much more difficult to provide safe and reliable service to utility customers. That is one of the fundamental reasons why utilities may deny access under the Pole/Telecomm Act for safety and engineering reasons. *See* 47 U.S.C. § 224(f)(2). As utilities made quite clear to the Commission during its rulemaking proceedings

addressing the 1996 Act amendments,[7] attachments (especially wireline attachments) put a substantial physical burden (weight and wind-loading) on utility plant. All attachments require additional utility time and effort to manage, in both responding to requests for attachment and when the utility property is moved, repaired, or otherwise rebuilt. This takes time and energy away from addressing utility customer issues in ways that cannot be accounted for by the simplistic terms of the FCC's rate formulae. The court's reasoning is akin to declaring that citizens who have a government-determined "spare" room must house soldiers for a rate no more than the cost of the extra power and water used, and regardless of wear, tear, and inconvenience, unless the homeowner can prove it had an alternative renter waiting to pay a higher price. That is not the standard required under the Fifth Amendment, as amply set forth in the government's own *Uniform Appraisal Standards for Federal Land Acquisitions*. *See* Appraisal Institute, *Uniform Appraisal Standards for Federal Land Acquisitions*, Sections B-2 and B-3 (5th ed. 2000) at *http://www.usdoj.gov/enrd/land-ack/yb2001.pdf* (visited April 30, 2003).

The view that the Fifth Amendment only guarantees just compensation for the net loss of a government taking divided this Court in *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003). There the Court held that interest earned in an IOLTA account is "'the private property of the owner of the principal.'" *Id.* at 1419, *citing Phillips v. Washington Legal Foundation,* 524 U.S. 156, 172 (2002). But, it ultimately concluded that just compensation for the IOLTA accounts should be zero, because funds in the trust accounts

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[7] Comments of the Edison Electric Institute and UTC, the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed June 27, 1997) *and see* Reply Comments of the Edison Electric Institute and UTC the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed Aug. 11, 1997).

held no value to the owners prior to the deposit of those funds in the IOLTA accounts. In short, the taking resulted in no net loss to the owner of the funds. *Id.* at 1420. The dissent objected to what it termed a "'Robin Hood Taking,' in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended." *Id.* at 1428.

UTC and EEI submit that the decision below presents the Court with an appropriate opportunity to clarify its decision in *Brown*. The decision below applies a *Brown*-like analysis to deny the value of pole attachments to utilities. *Alabama Power Co.*, 311 F.3d at 1369 (distinguishing pole attachments from real property because "the pole space is for practical purposes, nonrivalrous.") But, pole attachments do have value, as noted above and explained more fully herein, and pole attachments are a physical taking, not just a regulatory taking (or even a ratemaking). Therefore, not only should this case be reviewed on its own merits: *amici* herein suggest that it could also be reviewed in order to reexamine the legal principle applied in *Brown* and used below, that the Fifth Amendment only protects an owner from a net loss that results from a government taking of its property.

III. POLE ATTACHMENTS DO HAVE VALUE THAT CAN BE READILY DETERMINED

Even if the legal principle followed below is allowed to stand, this Court should still grant certiorari because utilities do incur a net loss in the value of poles, resulting from pole attachment regulation. While an IOLTA account may spur existential debate about its value for purposes of just compensation, there is no principled basis upon which to claim that there is no net loss of value to utilities that results from pole attachment regulation.

At the outset, there is the monetary value of the pole itself and all the maintenance costs associated therewith that are all reported in the various FERC accounts and that are factored into the FCC cable television and telecommunications attachment rates. As part of its just compensation case, petitioner and *amici* believe that the FCC cable rate excludes some actual, accountable costs that are attributable to pole attachments and which therefore should be included. *See* Comments of the Edison Electric Institute and UTC, the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed June 27, 1997) *and see* Reply Comments of the Edison Electric Institute and UTC the Telecommunications Association to the FCC, CS Docket No. 97-98 (filed Aug. 11, 1997), *but see Amendment of the Commission's Rules Regarding Pole Attachments*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-98, 16 FCC Rcd. 12103 (2001). But, the accounts that are included and the depreciation that accrues thereon are irrefutable proof of the value of the pole itself.

There is no denying that pole attachments make efficient use of utility infrastructure, which is one of the reasons that utilities provide pole attachments, even in the absence of regulation. But the court below should not have twisted that around to hold in essence that, but for the regulation, the value of the pole space would be nil. *See Alabama Power Co.*, 311 F.3d at 1369 (disputing that utilities incur losses from pole attachments in the same sense as land owners in a taking.) Contrary to the court below, there are comparable markets to determine fair market value. *Alabama Power Co.*, 311 F.3d at 1368 (stating that there is not an active, unregulated market for the use of "elevated communications corridors.") For example, public utilities and others that are exempt from Section 224 can and do negotiate fair market value for pole attachments. *See* 47 U.S.C. § 224 (a)(1)-(3). The Federal Government itself follows a policy of negotiating market rates for locating communications facilities on federal

property. *See* Appraisal Institute, *Uniform Appraisal Standards for Federal Land Acquisitions*, (5th ed. 2000) at *http://www.usdoj.gov/enrd/land-ack/yb2001.pdf* (visited April 30, 2003). *See* GSA Bulletin FPMR D-242, 62 Fed. Reg. 32,611 (June 16, 1997)(*extended*, 64 Fed. Reg. 30523 (June 8, 1999)); GSA Bulletin FPMR D-246, at 63 Fed. Reg. 10,631 (Mar. 4, 1998) (*extended*, 64 Fed. Reg. 30523 (June 8, 1999)). Thus, the court erred when it concluded that "there is not an active, unregulated market for the use of 'elevated communications corridors,'" from which fair market value could be determined for pole attachments. *Alabama Power Co.*, 311 F.3d at 1368.

Additional strong evidence of a loss to utilities is the rates that apply to telecommunications carriers, most of all the incumbent local exchange carriers that share in the cost of jointly held poles. As petitioner has stated, its revised cable rate that the FCC struck down was consistent with the rates that it charges incumbents for the use of jointly owned poles. *See* Brief for Petitioner at 7. Similarly, under Section 224(e), even competitive telecommunications carriers are subject to a rate higher than the cable rate. 47 U.S.C. §224(e). Even if a court rejects as speculative the lost opportunity of providing pole attachments to attaching entities under a completely unregulated regime, there is no "discounting" the fact that telecommunications carriers—both incumbent and competitive—do in fact pay more for pole attachments, which is further evidence of the true value of pole attachments. *Compare Alabama Power Co.*, 311 F.3d at 1368. (stating that "it is irrelevant that the Telecom Rate provided in 47 U.S.C. §224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments.") Therefore, the Court should grant certiorari to provide just compensation beyond marginal costs of pole attachments.

IV. NATIONWIDE IRREPARABLE HARM WILL RESULT FROM THIS DECISION.

Section 224 applies to a utility, as defined by Section 224(a)(1), "who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1). The term utility does not include, "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1). Section 224(c) permits a state to certify to the Commission that it regulates pole attachments in that state, at which time the Commission has no jurisdiction over pole attachments in that state until such time as the state fails to act on a pole attachment complaint for 180 days or complete action on the complaint for 360 days. 47 U.S.C. § 224(c). Eighteen states and the District of Columbia have certified that they regulate pole attachments. *See* States That Have Certified That They Regulate Pole Attachments, *Public Notice*, DA 92-201, 7 FCC Rcd. 1498 (1992). As such, Section 224 applies to those investor-owned utilities and local exchange carriers that operate in any one of the 32 states that have not reverse-preempted the FCC's pole attachment jurisdiction. Further, many of those states that do regulate pole attachments have borrowed the FCC rate methodologies for pole attachments.[8]

There are approximately 270 investor-owned utilities, serving an estimated 75% of the electric customers in the country. Many of these utilities have multi-state service territories extending over thousands of square miles. Their distribution networks that are subject to pole attachment regulation have grown over a hundred years to serve both

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[8] *See e.g.* ALASKA ADMIN. CODE tit. 3, § 52.920 (2002); CODE DEL. REGS. §10 800 016 (2002); *and* VT. CODE R. §30 000 007 (2002).

large and small population centers, and are primarily regulated by the states, which set depreciation cycles. These tend to run approximately twenty-five years for distribution pole plant.[9] As such, most of the utility distribution networks in the country, serving some of the largest markets, are subject to pole attachment regulation.

The FCC relies primarily on its enforcement authority to regulate pole attachment rates. From the outset, it was not authorized to prescribe rates, terms and conditions for CATV systems generally. S. Rep. No. 95-580, 95th Cong., 1st Sess., at 15, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 ("1977 Senate Report") (FCC jurisdiction over pole attachments "does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements.") Instead, Section 224 itself sets the range of rates that are just and reasonable for either cable television or telecommunications attachments. 47 U.S.C. §§ 224(d)-(e). Thus, a FCC pole attachment complaint decision, such as this one, sets a precedent for the entire industry to follow. As such, the decision before the Court will have a direct and widespread effect on the industry, much as if it were a rulemaking.

That the FCC decision went against the utility is not surprising given decisions by the FCC in the past.[10] Over the course of almost thirty years of regulation and hundreds of adjudications, UTC and EEI are unaware of any case where

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[9] ALASKA ADMIN. CODE tit. 3., § 52.455 (2002); FLORIDA ADMIN. CODE ANN. R 25-6.04361 (2002); ILLINOIS ADMIN. CODE. tit. 83 § 605.339 (2002); *and* N.Y. COMP. CODES R. &REGS. tit. 16, Ch. II, Subch. F, Art. 1 (2002).

[10] *See e.g. Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion & Order, PA 97-002, 2003 WL 1477823; and *Teleport Communications Atlanta v. Georgia Power Co.*, Order on Review, PA-01-003, 17 F.C.C.R. 19,859 (2002); and *RCN Telecomms Svcs. of Philadelphia v. PECO Energy Co.*, Phase I Order, DA 02-3485, 17 F.C.C.R. 25,238 (2002).

the FCC has upheld a rate increase by a utility or even a rate already agreed upon in a contract between a utility and an attaching entity. This fact reinforces the importance of judicial review of such cases.[11] What is surprising is that a federal court has gone beyond rejecting the rate increase, and has prescribed a rate for just compensation purposes that is even lower than the FCC's already discounted rate. Although the effective date of the decision has been stayed pending review by the Supreme Court, if it becomes effective it certainly would create a ripple effect for ongoing pole attachment negotiations with investor-owned utilities throughout the country. Moreover, this would also have an unjustifiable and unauthorized impact on the unregulated market, as the FCC's allowable rate would inevitably be cited by attaching entities in any negotiations with unregulated entities. Already, the FCC is citing the decision for the proposition that utilities do receive just compensation for pole attachments.[12] Certainly, attaching entities are likely to use it to extract further discounts for pole attachments or to take a complaint to the FCC. Therefore, swift and immediate review of that decision by this Court is necessary to prevent widespread irreparable harm to utilities and to the operation of the market for unregulated attachments and related markets.

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[11] *See Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985)(rejecting FCC determination that cable rate charged by utility was excessive) *and Texas Power & Light v. FCC*, 784 F.2d 1265 (5th Cir. 1986)(holding that it was arbitrary for FCC to deny the utility the right to include deferred taxes in its tax base and that utility is entitled to include its investment in private rights-of-way as a component to the cable rate.)

[12] *See Omnipoint Corp. v. PECO Energy Co.*, Memorandum Opinion & Order, PA 97-002, 2003 WL 1477823.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grants the Petition for Certiorari in this case.

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